TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 501

BIG VEIN COAL COMPANY OF WEST VIRGINIA,
PLAINTIFF IN ERROR,

vs.

BENJAMIN H. READ.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

FILED DECEMBER 24, 1908.

(22,988)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 912.

BIG VEIN COAL COMPANY OF WEST VIRGINIA,
PLAINTIFF IN ERROR,

vs.

BENJAMIN H. READ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

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In the Circuit Court of the United States for the Northern District of West Virginia, Parkersburg.

G VEIN COAL COMPANY OF WEST VIRGINIA, Plaintiff, Plaintiff in Error,
v.
BENJAMIN H. READ, Defendant.

In Debt.

on Writ of Error from the Supreme Court of the United States.

Osborne I. Yellott, Calvert Building, Baltimore, Md.; George W. hnson, Parkersburg, West Va., Attorneys for plaintiff in error.
B. M. Ambler, Parkersburg, West Va., Attorney for defendant in or.

Be it remembered, that heretofore, to-wit: On the 26th day of June, 1911, came the Big Vein Coal Company, a corporan, and filed in the Clerk's office of the Circuit Court of the United tes for the Northern District of West Virginia, at Parkersburg, Declaration against Benjamin H. Read, which Declaration is in words and figures following, to-wit:

the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY, a Corporation, Plaintiff,
vs.
NJAMIN H. READ, Trading and Doing Business as Lynah & Read, Defendant.

In Debt.

Big Vein Coal Company, a corporation, organized, existing and do- business under the laws of the State of West Virginia, and as such suing purposes, a citizen in and of the State of West Virginia, niciled in the Northern District thereof, complains of Benjamin Read, trading and doing business as Lynah & Read, a citizen of domiciled in the State of Maryland, who has been duly sumned to answer of a plea that he render unto the said Big Vein l Company, the sum of $2,075.52 evidenced by four notes, more ifically hereinafter set out, along with the interest on each of notes, as hereinafter mentioned, which to the plaintiff he owes from him unjustly detains, subject to a credit of $31.46, as of of December 16, 1910.

nd thereupon the said plaintiff, Big Vein Coal Company, saith heretofore, to-wit, on October 24, 1910, in the City of Baltimore,

Maryland, the said Benjamin H. Read, trading as aforesaid, by his certain writing obligatory, signed Lynah & Read, promised
2 to pay to the said plaintiff, Big Vein Coal Company, or order, four months after date thereof, the sum of $555.00, for value received, with interest thereon from the date of its maturity.

And thereupon the said plaintiff, Big Vein Coal Company, saith that heretofore, to-wit, on November 25, 1910, in the City of Baltimore, Maryland, the said Benjamin H. Read, trading as aforesaid, by his certain writing obligatory, signed Lynah & Read, promised to pay to the said plaintiff, Big Vein Coal Company, or order, four months after date thereof, the sum of $710.12, with interest thereon from the date of its maturity.

And thereupon the said plaintiff, Big Vein Coal Company, saith that heretofore, to-wit, on August 15, 1907, in the City of Baltimore, Maryland, the said Benjamin H. Read, trading as aforesaid, by his certain writing obligatory, signed Lynah & Read, promised to pay to the said plaintiff, Big Vein Coal Company, or order, the sum of $60.46, on demand, for value received, with interest thereon from the date of its maturity.

And thereupon the said plaintiff, Big Vein Coal Company, saith that heretofore, to-wit, on November 25, 1910, in the City of Baltimore, Maryland, the said Benjamin H. Read, trading as aforesaid, by his certain writing obligatory, signed Lynah & Read, promised to pay to the said plaintiff, Big Vein Coal Company, or order, four months after date thereof, the sum of $750.00, for value received, with interest thereon from the date of its maturity.

Yet the said defendant, although often requested so to do, has not as yet paid the said sum of $2,075.58, first above demanded, or any part thereof, except the said $31.46, to the said plaintiff, or to the order of the said plaintiff, nor has the defendant paid the interest thereon, or any part thereof, as above demanded, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of the said plaintiff, $4,000.00, and therefore, it sues.

GEO. W. JOHNSON,
OSBORNE I. YELLOTT,
P. Q.

3 STATE OF MARYLAND,
County of Baltimore, to-wit:

Howard R. Taylor being by me, the undersigned authority, first duly sworn, says that he is Treasurer of the Big Vein Coal Company, a corporation, plaintiff in the above styled action, and that he is familiar with the claims and demands set up in said declaration, against Benjamin H. Read, trading and doing business as Lynah & Read; and that he verily believes that there is due and unpaid from the defendant, Benjamin H. Read, to it, the Big Vein Coal Company, upon the demands stated in the declaration, including principal and interest, after deducting all payments, credits and sets-off, made by the defendant, to which he is entitled, the sum of $2,144.20, as will more fully appear from the itemized statement of

calculations hereto made as a part of my affidavit, and marked for identification "Deponent's Exhibit A."

Deponent further says that he is Treasurer of the Big Vein Coal Company, plaintiff, and is fully authorized to make this affidavit.

Deponent further says that the interest upon the demands sued upon, is calculated up to and including the 9th day of January, 1912.

HOWARD R. TAYLOR,
Treasurer Big Vein Coal Company.

Taken, sworn to and subscribed and given under my official seal, before me, a Notary Public in and for the State of Maryland and County of Baltimore, as aforesaid, this 23rd day of June, 1911.

[SEAL.]

J. LE ROY HOPKINS,
Notary Public.

My commission expires on the 1st day of May, 1912.

DEPONENT'S EXHIBIT A.

Statement of Calculations.

Note of October 24th, 1910	$555.00	
Interest from Feb. 24, 1911, to Jan. 9th, 1912, 319 days	29.51	
		$584.51
Note of November 25th, 1910	$710.12	
Interest from March 25th, 1911, to Jan. 9th, 1911, 290 days	34.32	
		744.44
Note of November 25th, 1911	750.00	
Interest from March 25th, 1911, to Jan. 9th, 1911, 290 days	36.25	
		786.25
Note of August 15th, 1907	60.46	
Less cash paid December 16th, 1910, which said payment the plaintiff has applied on account of this note	31.46	
		29.00
Total		$2,144.20

Summons.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

You are hereby commanded to summon Benjamin H. Read, trading and doing business as Lynah & Read, citizen of and resident in

the State of Maryland, to appear before the Judges of the Circuit Court of the United States, in and for the Northern District of West Virginia, at the City of Parkersburg, at Rules to be held in the Clerk's office of the said Court, on the first Monday in August, next, to answer unto Big Vein Coal Company, a corporation, organized, existing and doing business under the laws of the State of West Virginia, and as such for suing purposed, a citizen in and of the state of West Virginia, of a plea in Debt, damages $4,000.00, and have then there this writ.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of June, A. D. 1911, and in the 135th year of the Independence of the United States of America.

[SEAL.] S. R. HARRISON,
Clerk Circuit Court U. S., N. D. W. Va.

Endorsed: "Received this writ at Parkersburg, West Va., July 1st, 1911. Returned Not Executed. Defendants not found in my District.

JAMES E. DOYLE,
U. S. Marshal, N. D. W. Va.,
By A. T. BARRETT,
Ch'f Off. Deputy.

July 27th, 1911.

6 *Affidavit of Howard R. Taylor.*

(Filed June 26, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY, a Corporation, Plaintiff,
vs.
BENJAMIN H. READ, Trading and Doing Business as Lynah & Read, Defendant.

In Debt.

This day Howard R. Taylor appeared before me, the undersigned authority, and being by me first duly sworn, did depose and say as follows:

First. That he is the Treasurer of the Big Vein Coal Company, a corporation, plaintiff in the above entitled cause, and that he is duly and fully authorized, for and on behalf of said corporation, to make this affidavit.

Second. That the defendant, Benjamin H. Read, trading and doing business as Lynah & Read, owes the said plaintiff, Big Vein Coal Company, at the least, the sum of $2108.14, including principal and interest, subject, however, to a credit thereon as of December 16, 1910, of $31.46, leaving a net total indebtedness of $2076.08; said interest is calculated upon the demands hereinafter

mentioned, after the maturity thereof, up to the date of the making of this affidavit; said demands are as follows:

(*a*) A note of the said defendant, Benjamin H. Read, signed Lynah & Read, dated October 24, 1910, at Baltimore City, Baltimore, Maryland, payable four months after date, to the order of the plaintiff, Big Vein Coal Company, for $550.00 with interest, after maturity.

(*b*) A note of Benjamin H. Read, signed by Lynah & Read, dated Baltimore City, Baltimore, Maryland, November 25,
7 1910, payable four months after date, to the order of Big Vein Coal Company, for $710.12, with interest after maturity.

(*c*) A note of Benjamin H. Read, signed by Lynah & Read, dated Baltimore City, Baltimore, Maryland, August 15, 1907, for $60.46, payable on demand to the order of Big Vein Coal Company, with interest after maturity.

(*d*) A note of Benjamin H. Read, signed by Lynah & Read, dated Baltimore City, Baltimore, Maryland, November 25, 1910, four months after date, payable to the order of Big Vein Coal Company, for $750.00, with interest after maturity.

That the affiant believes the plaintiff is justly entitled to recover, at the least, the said sum of $2076.68, in this action or suit.

Affiant also says that the defendant, Benjamin H. Read, trading and doing business as Lynah & Read, is a non-resident of the State of West Virginia.

Affiant further says that Benjamin H. Read, the defendant, along with Jesse L. Slingluff, were appointed Receivers of the Circuit Court for the Northern District of West Virginia, for the property of the Oakland Coal & Coke Company, involved in the chancery suit of the Baltimore Trust & Guaranty Company vs. The Oakland Coal & Coke Company, pending in the said Circuit Court for the Northern District of West Virginia, at Parkersburg, and that as such Special Receiver, there has been allowed to the said Benjamin H. Read, for services as such Receiver, by the report of Special Master, Charles D. Merrick, to whom said cause was referred, the sum of $2000.00; that said report has been filed with the Clerk of said Circuit Court, at Parkersburg, in which the said sum of $2000.00 is allowed; that the Court itself has taken no action upon said report and the same still remains in the Clerk's office for action thereon by the Court itself.

HOWARD R. TAYLOR.

8 Taken, sworn to and subscribed before me, the undersigned authority, and given under my official seal, in my said County, this 23rd day of June, 1911.

[SEAL.] J. LE ROY HOPKINS,
Notary Public.

My commission expires on the 1st day of May, 1912.

9 And on the same day, to-wit: On the 26th day of June, 1911, in the clerk's office of said court, the following order was made and entered of record, to-wit:

Order of Attachment.

BIG VEIN COAL COMPANY, a Corporation, Plaintiff,
v.
BENJAMIN H. READ, Trading and Doing Business as Lynah & Read, Defendant.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

The plaintiff in this case, having filed its affidavit as required by law, the Marshal of the United States for the Northern District of West Virginia, is required in the name of the United States of America, to attach the estate of the defendant, Benjamin H. Read, sufficient to pay the sum of $2076.68, and the costs of this suit, and to make return of his proceedings under this order, to the next term of the Circuit Court of the United States for the Northern District of West Virginia, at Rules to be held on the first Monday in August, to-wit, August 7, 1911.

Witness the Honorable Edward D. White Chief Justice of the United States, this 26th day of June, A. D. 1911, and in the 135th year of the Independence of the United States of America.

[SEAL.]

S. R. HARRISON,
Clerk, C. C. U. S., N. D. W. Va.

Endorsed: Received this writ at Parkersburg, W. Va., July 1st, 1911. Returned not Executed. After due diligence used in
10 trying to locate property of the within defendant, in my district, upon which to serve this attachment, I am unable to do so and return writ not executed no property found in my district.

JAMES E. DOYLE,
U. S. Marshal,
By A. T. BARRETT,
Chf. Off. Deputy.

July 27, 1911.

11 And on the same day, to-wit, On the 26th day of June, 1911, the following order was made and entered of record, to-wit:

At Law.

BIG VEIN COAL COMPANY, a Corporation, Plaintiff,
vs.
BENJAMIN H. READ, Trading and Doing Business as Lynah & Read, Defendant.

It appearing to the Court from the inspection of the Declaration, pleadings, affidavits and papers in this cause filed, that there is claimed from the defendant by the plaintiff, the sum of $2075.58, with interest, subject, however, to a credit as of December 16, 1910, of $31.46, and that defendant is a non-resident of the State of West Virginia; and that the Special Commissioner, C. D. Merrick, in the suit of The Baltimore Trust & Guaranty Company vs. The Oakland Coal & Coke Company, has found due to Benjamin H. Read, the defendant, the sum of $2000.00, as Special Receiver for services rendered as such, in said cause, along with Jesse Slingluff, Co-Receiver, and that the plaintiff has proceeded, under Chapter 106 of the Code of West Virginia, to have said sum attached on account of said claim, in the declaration set up; and that the plaintiff has caused the Clerk of this Court, upon proper affidavit filed, to issue an order of attachment and place the same in the hands of the Marshal of this District, for service, for the purpose of attaching the estate of the defendant, to answer the claim set up in this cause,

On consideration whereof, it is ordered that the said defendant do appear before this Court, in the Northern District of West Virginia, at Parkersburg, in said District, to plead, answer or demur to the declaration in this cause filed, on or before the August rules, 1911.

It is further ordered that a copy of this order by served upon the said defendant, wherever found.

12 It is further ordered that a copy of this order also be served upon Jesse L. Slingluff and Benjamin H. Read, Special Receivers in the chancery cause of The Baltimore Trust & Guarantee Company vs. The Oakland Coal & Coke Company, which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached, in this proceeding.

Enter: June 26, 1911.

ALSTON G. DAYTON, *Judge.*

Attest:

S. R. HARRISON, *Clerk.*

13 *Copy of Order of Court Served on Defendant, etc.*

(Returned and Filed July 11, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, June 26, 1911, at Chambers.

At Law.

BIG VEIN COAL COMPANY, a Corporation, Plaintiff,
vs.
BENJAMIN H. READ, Trading and Doing Business as Lynah & Read, Defendant.

It appearing to the Court from the inspection of the Declaration, pleadings, affidavits and papers in this cause filed, that there is claimed from the defendant by the plaintiff the sum of $2075.58, with interest, subject, however, to a credit as of December 16, 1910, of $31.46, and that defendant is a non-resident of the State of West Virginia, and that the Special Commissioner, C. D. Merrick in the suit of The Baltimore Trust & Guarantee Company vs. The Oakland Coal & Coke Company, has found due to Benjamin H. Read, the defendant, the sum of $2000.00 as Special Receiver for services rendered as such, in said cause, along with Jesse Slingluff, Co-Receiver, and that the plaintiff has proceeded, under Chapter 106 of the Code of West Virginia, to have said sum attached on account of said claim, in the declaration set up; and that the plaintiff has caused the Clerk of this Court, upon proper affidavit filed, to issue the order of attachment and place the same in the hands of the Marshal of this District, for service, for the purpose of attaching the estate of the defendant, to answer the claim set up in this cause.

On consideration whereof, it is ordered that the said defendant do appear before this Court, in the Northern District of West Virginia, at Parkersburg, in said District, to plead, answer or demur to the declaration in this cause filed, on or before the August rules, 1911.

14 It is further ordered that a copy of this order be served upon the said defendant wherever found.

It is further ordered that a copy of this order also be served upon Jesse L. Slingluff and Benjamin H. Read, Special Receivers in the chancery cause of The Baltimore Trust & Guarantee Company v. The Oakland Coal & Coke Company, which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached, in this proceeding.

Enter: June 26, 1911.

ALSTON G. DAYTON, *Judge.*

Attest:

S. R. HARRISON, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do certify that the foregoing is a true copy of order entered of record in said Court on the 26th day of June, 1911, in the suit at law entitled Big Vein Coal Co. v. Benjamin H. Read, therein pending.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court, at Parkersburg, in said District, this 26th day of June, 1911.

[SEAL.] S. R. HARRISON, *Clerk.*

Endorsed: Served copy of the within Notice & Order of Court on Jesse Slingluff and Benjamin H. Read, Receivers of the Oakland Coal & Coke Company, also served copy on Benjamin H. Read as an individual, at Baltimore, Maryland, July 5, 1911. George W. Padgett, U. S. Marshal, per J. Wesley Gilroy, Deputy U. S. Marshal.

15 And at another day, to-wit: On the 18th day of October, 1911, the following order was made and entered of record, to-wit:

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL CO.
v.
BENJAMIN H. READ.

In Debt.

The defendant, Benjamin H. Read, by B. M. Ambler, his counsel, this day appeared in court for the purpose only of objecting to the jurisdiction of the court in this case, and moves the court to dismiss the suit and quash the attachment herein, on the grounds following:

First. The record shows that this defendant is not a citizen of or resident, in, nor found within the Northern District of West Virginia.

Second. The record shows that the defendant has no property whatever within the said State or District.

Third. That this court has no jurisdiciton in rem or in personam in said action.

Fourth. That at the time of the suing out of the writs of summons and of attachment herein on the 26th day of June, 1911, this defendant was not a citizen or resident or found within West Virginia, and he had no property in said State or District, and at no time since has this defendant been such citizen or resident, or had any property within the said District, although the return day of the said writs has long since passed and the defendant makes the

said writs and the returns thereon by the Marshal for the Northern District of West Virginia a part of this motion.

Fifth. The fund or compensation ordered by this Honorable Court to be paid to the defendant for services as Receiver was not, at the time of the issuance of said writs or at any time since then,
16 liable to be attached upon the alleged indebtedness of the plaintiff or for the payment thereof, in this Honorable Court.

Sixth. This Honorable Court has no jurisdiction either of property or person giving jurisdiction for the maintenance of the said action.

And the said defendant limiting his appearance to the express and only purpose of objection to the jurisdiction of this Honorable Court, he moves that the said action be dismissed and the said attachment quashed and discharged.

BENJAMIN H. READ,
By B. M. AMBLER.

It is ordered that foregoing motion be filed and spread upon the record. And thereupon, came the plaintiff by Mr. Osborne I. Yellott, its counsel, and the matters arising upon the motion aforesaid were argued by counsel respectively, and submitted to the court.

Enter: Oct. 18, 1911.

ALSTON G. DAYTON, *Judge.*

Attest:
S. R. HARRISON, *Clerk.*

17 And at another day, to-wit: On the 24th day of October, 1911, the following order was made and entered of record, to-wit:

UNITED STATES OF AMERICA,
Fourth Judicial Circuit:

I, the undersigned, a Circuit Judge in and for the said Fourth Judicial Circuit, being of the opinion that the public interest so requires, do hereby designate and appoint the Hon. Benjamin F. Keller, United States District Judge for the Southern District of West Virginia, a District of the Fourth Circuit, to hold a Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg, in said District, commencing on the ninth of November, 1911, or as soon thereafter as practicable, and continuing until the business before said Court is completed, to act in the place of and in aid of the Hon. Alston G. Dayton, the District Judge of said Northern District of West Virginia. The said Hon. Benjamin F. Keller so designated and appointed, to have and to discharge all the judicial duties of the said Hon. Alston G. Dayton, Judge of the said Northern District of West Virginia, during the continuance of the said term hereinbefore provided for.

Given under my hand in the said Fourth Judicial Circuit, this October 24, 1911.

NATHAN GOFF,
United States Circuit Judge, Fourth Circuit.

18 And at another day, to-wit: On the 9th day of November, 1911, the following order was made and entered of record, to-wit:

BIG VEIN COAL CO. OF W. VA.
vs.
BENJAMIN H. READ.

In Debt.

This day the defendant again appeared by counsel for the purpose only of objecting to the jurisdiction and for the purpose of the motions herein only, and further moved the court to vacate and set aside the orders of court issued and entered herein, and to quash and set aside the service of the summons and process in this action and to dismiss the action; and this present motion and the motions heretofore made in the cause by the defendant are based upon the plaintiff's Declaration, and all proceedings and process herein, and upon the affidavits filed by and on behalf of the plaintiff, and the order of Attachment and the returns of service and execution of the several writs issued in this action. And the plaintiff thereupon appeared and resisted said motions, by counsel. And thereupon at request of plaintiff, and the defendant denying the jurisdiction of the court, and the defendant still limiting his appearance to the purposes aforesaid. It is ordered that the following facts are admitted by the parties to be true for the purposes of the matters here pending, and shall be entered of record—but without prejudice to any motion of the defendant and without enlarging the appearance of the defendant.

Messrs. Read and Slingluff were appointed Receivers in the cause of the Baltimore Trust & Guarantee Company vs. The Oakland Coal & Coke Company of West Virginia, a cause pending in the United States Circuit Court for the Northern District of West Virginia, by an order in said cause passed on the twelfth day of June, 1907, and the receivership estate being ready for distribution on June 20, 1910, this Court passed a decree referring the cause to Special Master C. D. Merrick, with directions among other things to make a report "in-

19 cluding costs and allowances and fees to the end that a full and complete decree might be made for the distribution and settlement of the estate."

On May 15th, 1911, the Special Master filed such report. Among other allowances were the following:

"That Benjamin H. Read, for his services as Receiver, is entitled to and should be allowed the sum of Two Thousand Dollars."

That no objection had been taken or exceptions made to the above allowance at the time the attachment was laid in this cause.

That in July, 1911, this Court passed an order ratifying the report of the Master as to the above and similar allowances, but directed that the allowance of $2000 commissions to B. H. Read be retained by the Receivers pending the determination of the questions arising out of such attachment.

Enter: Nov. 9, 1911.

BENJ. F. KELLER,
Dist. Judge, Specially Assigned.

20 *Opinion of the Court.*

(Filed November 18, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY
versus
BENJAMIN H. READ.

In Debt.

Appearances:

B. M. Ambler, for the motion;
Geo. W. Johnson, and Osborne I. Yellott, contra.

Opinion on Motion to Quash.

KELLER, *District Judge:*

The declaration in this case was filed June 26, 1911, by the complainant, a West Virginia corporation, against the defendant described as a citizen and resident of the State of Maryland, the declaration counting upon certain notes made by defendant, trading under the name of Lynah and Read. On the same day, summons was issued and returned July 27, 1911, "not found." On the said 26th day of June, 1911, an order of attachment was also issued out of the Clerk's office, and placed in the hands of the Marshal, and was returned on July 27, 1911, with the endorsement following: "Received this writ at Parkersburg, W. Va., July 1, 1911. Returned not executed. After due diligence used in trying to locate property of the defendant, in my district, upon which to serve this attachment, I am unable to do so, and return writ not executed, no property found in my district."

And on the said 26th day of July, 1911, the plaintiff by its attorneys, secured from the Judge of the Court the following ex-parte order which will explain itself:

21 "It appearing to the Court from the inspection of the Declaration, pleadings, affidavits and papers in this cause filed, that there is claimed from the defendant by the plaintiff, the sum of $2075.58, with interest, subject, however, to a credit as of December 16, 1910, of $31.46, and that defendant is a non-resident of the State of West Virginia; and that the Special Commissioner, C. D. Merrick, in the suit of The Baltimore Trust & Guaranty Company vs. The Oakland Coal & Coke Company, has found due to Benjamin H. Read, the defendant, the sum of $2000.00 as Special Receiver for services rendered as such, in said cause, along with Jesse Slingluff, Co-Receiver, and that the plaintiff has proceeded, under Chapter 106 of the Code of West Virginia, to have said sum attached on account of said claim, in the declaration set up; and that

the plaintiff has caused the Clerk of this court, upon proper affidavit filed, to issue the order of attachment and place the same in the hands of the Marshal of this district, for service, for the purpose of attaching the estate of the defendant, to answer the claim set up in this cause.

On consideration whereof, it is ordered that the said defendant do appear before this court, in the Northern District of West Virginia, at Parkersburg, in said District, to plead, answer or demur to the declaration in this cause filed, on or before the August rules, 1911.

It is further ordered that a copy of this order be served upon the said defendant, wherever found.

It is further ordered that a copy of this order also be served upon Jesse L. Slingluff and Benjamin H. Read, Special Receivers in the chancery cause of The Baltimore Trust & Guarantee Company vs. The Oakland Coal & Coke Company, which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached, in this proceeding."

This order was served upon the Receivers as such and upon Benj. H. Read, individually, and in so far as practical effects are concerned, operates as an attachment in the hands of the co-receivers, of the sum of $2000 allowed to Benj. H. Read for services as a Receiver.

The matter is before me upon the entry of a motion to quash the attachment and dismiss the suit for lack of jurisdiction, such motion being made under a special appearance entered for such purpose only.

Strictly speaking, there has been no levy of an attachment in this case as is shown by the return of the Marshal, but the ex-parte order obtained on June 26, 1911, having the effect of tying up the allowance made of the Master to Benj. H. Read, Receiver, the motion will be treated as one to set aside and annul said order of June 26, 1911, as improvidently awarded.

It has been suggested by counsel for the plaintiff that notwithstanding the fact that the motion filed in this case strictly
22 limits the appearance to the purpose of contesting the jurisdiction of the court upon the attachment proceedings, or those in the nature of attachment a waiver may have been worked by the form of the motion. In view of the course taken in securing the ex parte order hereinbefore quoted, I do not think there is merit in this suggestion. Had the Marshal succeeded in attaching property of the defendant in the district, all that would have been necessary would have been either a simple motion to quash the attachment or a plea to the jurisdiction so far as the attachment was concerned. The course taken introduced an unusual element into the form of the proceedings, and as the evident purpose of the motion was simply to contest the right of the plaintiff to have obtained the order that effectually tied up this fund in the hands of the Receivers, it will be so treated.

The gist of the motion is that this action at law being founded, not upon a lien or claim against any specific property, real or personal, but being a personal demand against the defendant, no

valid judgment against him can be obtained without a personal service of process in the district where suit is brought, and that the passage of Sec. 6 of the Act of June 1, 1872, now found as Sec. 915, R. S. U. S., did not have the effect of conferring a jurisdiction, but merely of affording remedies by attachment and otherwise after jurisdiction regularly acquired.

To this proposition I must give my unqualified assent, and I regard it as a proposition too well settled to need extended comment.

The Act of 1872, now incorporated in the Revised Statutes of the United States as Secs. 914, 915, has no reference or relation to the requirements to give jurisdiction to a Circuit Court of the United States, but applies State attachment and other State statutes to any case in such Circuit Court where the jurisdiction has been properly acquired by personal service of process, or its equivalent of personal appearance.

Even under the broad jurisdictional Act of 1875, no attachment such as was sued out in this case, could have been maintained.

23 In ex-parte Des Moines and Minneapolis Railroad Company, petitioner, 103 U. S. 794; 26 L. ed. 461, Mr. Chief Justice Waite, delivering the opinion of the Court, said:

"It is conceded that the person against whom this suit was brought in the Circuit Court, was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, *he* was not suable in the Circuit Court of the District of Iowa and unless he could be sued, no attachment could issue from that Court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained, the attachment must fall."

In Nazro v. Craign, Fed. Cas. No. 10,062, 3 Dill. 474, Mr. Justice Miller sitting on Circuit, discussing the effect of the Act of June 1, 1872, said:

"It is next urged that the jurisdiction asserted by the district Court is conferred by Section 6 of the Act of June 1, 1872 (17 Stat. 196). But in my judgment this is a mistaken notion of the design of this section. It does not repeal the limitation in the judiciary Act. Prior to the legislation of 1872, just noticed, the Federal courts had, by rule, generally adopted the State laws, as respects attachments of property, but it was never supposed that jurisdiction could be exercised without personal service on the defendant, made within the district. The Statute of 1872 adopts existing provisions of the State laws in this regard, and gives the Court power, by rule, to adopt provisions subsequently enacted by the States, but, in my opinion, it was not intended by Congress to make the great change for which the assignee's counsel here contends. It would compel citizens of the Pacific coast to go to New York to defend their property, which happened to be there, and would give the great central cities vast power. I cannot but think that a change so radical would have been expressed by Congress in unmistakable language. And this view is strengthened by the consideration that no publication is provided for by the section under

nsideration, while a subsequent section of the same Act does ovide for publication in respect to certain suits in equity.
The effect of this section in the Act of 1872, is simply this: If e Court has, or can acquire, jurisdiction over the defendant per- ally, this section gives to the plaintiff the right to the auxiliary nedy by attachment, but it does not afford a means of acquiring isdiction."
In Harland vs. United Lines Tel. Co., 40 Fed. 308, Shipman, Cir- t Judge, in 1889, after the last amendment to the Judiciary Act, ed in entire harmony with the cases cited, the syllabus in the e being as follows:
"Although Act. Cong. March 3, 1887, authorized an original suit ught in the Circuit Court, where jurisdiction is founded on the of diversity of citizenship solely, to be brought in the district he residence of either plaintiff, or defendant, and the Statutes of nnecticut permit the attachment of the property located in the State, of a non-resident defendant, without personal service on him, and in the absence of voluntary appearance, the subjection of such property to a judgment in rem, Rec. St. S. Secs. 914, 915, authorizing the practice and modes of pro- ure in Federal Courts to be conformed to those of the respective es wherein such courts are held, and authorizing the same edies by attachment as are provided by the laws of those states, not give a United States Circuit Court, sitting in Connecticut, sdiction of proceedings in rem against the property of a non- dent defendant, who has not been personally served or appeared."
he opinion is this case fully supports the syllabus quoted.
o the same effect is the opinion of Judge Clark, in Central Trust v. Chattanooga R. & C. R. Co., 68 Fed. 685, decided in 1895, I have been unable to find any cases holding the contrary.
find myself fully in accord with these adjudicated cases, and reasoning upon which the decisions are based. Doubtless, the liary remedy by attachment is authorized in the Federal Courts, it must be applied in cases only of which those courts are in- d with jurisdiction, and the Act of 1872, cannot properly be trued as limiting or repealing any of the requirements of the so- d judiciary Acts.
follows that the order of June 26, 1911, amounting to an at- ment herein, must be set aside; but inasmuch as personal service the defendant in the action may yet be obtained by an alias mons, I know of no authority to go further and direct the issal of the action.
sts upon the motion are awarded to the defendant.

And on the same day, to-wit: On the 18th day of Novem- ber, 1911, the following order was made and entered of d, to-wit:

BIG VEIN COAL COMPANY OF WEST VIRGINIA
versus
BENJAMIN H. READ.

In Debt.

This day came the plaintiff by its attorneys, Geo. W. Johnson and Osborne I. Yellott, and the defendant, Benj. H. Read, appearing specially, by his attorney, B. M. Ambler, for the purpose only of contesting the jurisdiction of the court herein; and the motion of the defendant to quash the order of attachment herein coming on to be heard upon the declaration herein, the process returned unexecuted, the order of court entered on the 26th day of June, 1911, and the agreed facts set forth in the consent order of Nov. 9, 1911, being argued by counsel, is sustained as improvidently awarded by the Clerk. And the Order entered herein on the 26th day of June. 1911, providing for service of a copy thereof on Jesse Slingluff and Benj. H. Read, Receivers in the equity cause of Baltimore Trust & Guaranty Company vs. Oakland Coal & Coke Company and upon Benj. H. Read, individually, is also set aside, as improvidently awarded; and the court, being of opinion that it hath jurisdiction of the subject matter of this action, doth decline at this time to dismiss the action, but doth continue the same, for service of process.

Enter: Nov. 18, 1911.

BENJ. F. KELLER,
District Judge, Specially Assigned.

Attest:
S. R. HARRISON, *Clerk.*

26 *Stipulation in re Hearings at Clarksburg.*

(Filed November 27, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

In Debt.

And now comes the plaintiff, by George W. Johnson and Osborne I. Yellott, its attorneys and says, that whereas, it has been suggested by counsel for the defendant that the order assigning the Honorable Benjamin F. Keller, District Judge, provided for his sitting on this cause at Clarksburg, when the same was pending at Parkersburg, and by consent of counsel was argued at Clarksburg, and that for such reasons this cause should be regarded as transferred to Clarksburg, the said plaintiff doth hereby waive any and all ob-

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jections which it might otherwise make to said cause having been heard at Clarksburg while pending at Parkersburg, and doth agree that if it shall seem proper to the Court, and can be so regarded without prejudice to the plaintiff, said cause may be regarded as having been transferred to Clarksburg, and doth waive the necessity for any formal order of Court for such transfer.

GEO. W. JOHNSON,
OSBORNE I. YELLOTT,
Attorneys for Plaintiff.

Consent to the above is given for the purpose only of arranging for hearing objections to jurisdiction and motions standing on special appearance of defendant.

B. M. AMBLER,
Attorney for Benj. H. Read.

27 *Plaintiff's Refusal to Direct Alias Process.*

(Filed November 27, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

In Debt.

Now comes the plaintiff, by George W. Johnson and Osborne I. Yellott its attorneys and still respectfully contending that this Honorable Court had jurisdiction to issue the order of attachment heretofore issued in this cause, and to pass its order of June 26th, 911, providing, among other things, for service of a copy thereof n Jesse Slingluff and Benjamin H. Read, Receivers in the equity ause of Baltimore Trust Company vs. Oakland Coal and Coke Comany and upon Benjamin H. Read, individually, and that the issung of alias process against the defendant, Benjamin H. Read and s service upon him, are not necessary in order to enable this laintiff to further maintain its said action and attachment, doth efuse to direct alias process to issue in this cause against the dendant Benjamin H. Read.

GEO. W. JOHNSON,
OSBORNE I. YELLOTT,
Attorneys for Plaintiff.

3 And on the same day, to-wit: On the 27th day of November, 1911, the following order was made and entered of cord, to-wit:

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BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

In Debt.

It appearing to the Court that the plaintiff, by George W. Johnson and Osborne I. Yellott, its attorneys, have entered upon the record in this cause the plaintiff's refusal to direct alias process to issue against the defendant Benjamin H. Read, contending as in said order set forth, and the defendant by B. M. Ambler, his attorney, having heretofore filed in this cause his motion to dismiss the action herein, said action is hereby dismissed, with costs to the defendant.

Enter: Nov. 27, 1911.

BENJ. F. KELLER,
Dist. Judge.

Attest:
S. R. HARRISON, *Clerk.*

29 *Court's Certificate.*

(Filed and Entered November 28, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

In Debt.

In this cause I hereby certify that the judgment complained of in the plaintiff's petition for a writ of error is based solely on the ground that this Court had no jurisdiction as a Federal Court of the United States to permit the plaintiff to maintain its said action or subject to the claim of the plaintiff the funds, assets and credits of the defendant sought to be attached in this case, in the absence of personal service of summons upon the said defendant within said Northern District of West Virginia, or of his voluntary appearance in this cause, and that the motion filed in this cause on behalf of the defendant to dismiss the action and quash the attachment herein did not constitute such a voluntary appearance on the part of the defendant as to give this Court, as a Federal Court of the United States, jurisdiction to grant the plaintiff a personal judgment against the defendant or to pass a final judgment or order subjecting to the claim of the plaintiff such funds, assets and credits so sought to be attached.

This certificate is made conformably to Act of Congress of March

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3, 1891, chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings with this certificate.

30 Dated this 28th day of November, A. D. 1911.

BENJ. F. KELLER,
District Judge, Holding the Circuit Court of the United States for the Northern District of West Virginia.

31 *Petition for Writ of Error and Assignment of Errors.*

(Filed November 28, 1911.)

In the Circuit Court of the United States for the Northern District of West Virginia.

BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

Petition for Writ of Error, Assignment of Errors and Prayer for Reversal.

In Debt.

Considering itself aggrieved by the final decision of the Circuit Court of the United States for the Northern District of West Virginia in rendering judgment against it in the above entitled case, which said final decision was made by the order of said Court filed on the 17th day of November, 1911, quashing the plaintiff's writ of attachment and revoking its order of June 26th, 1911 therein referred to, and by its further order subsequently filed dismissing the plaintiff's action upon its refusal to order further process against the defendant, the plaintiff hereby prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors in said decision and judgment hereinafter more particularly set forth, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that this Honorable Court may pass an order fixing the amount of a supersedeas bond.

And the said Big Vein Coal Company of West Virginia assigns the following errors in the records and proceedings of the said case:

The Circuit Court of the United States for the Northern District of West Virginia erred in holding and deciding that said
32 Court did not have jurisdiction as a Federal Court of the United States, to render a valid judgment in favor of the plaintiff in this cause.

The said errors are more particularly set forth as follows:

The Circuit Court of the United States for the Northern District of West Virginia erred in holding and deciding—

IN CENTER

First. That it had no jurisdiction as a Federal Court of the United States to grant the plaintiff, a corporation, duly incorporated under the laws of the State of West Virginia, relief in this cause by way of a judgment or final order subjecting to the claim of the plaintiff the funds, assets and credits of the defendant sought to be attached in this cause, in the absence of personal service of summons upon the said defendant within said Northern District of West Virginia, or of his voluntary appearance in this cause;

Second. That the motion filed in this cause on behalf of the defendant to dismiss the action and quash the attachment herein did not constitute such a voluntary appearance to this cause on the part of the defendant as to give said Court, as a Federal Court of the United States, jurisdiction to grant the plaintiff a personal judgment against the defendant.

Third. That the motion filed in this cause on behalf of the defendant to dismiss the action and quash the attachment herein did not constitute such a voluntary appearance to this cause on the part of the defendant as to give said Court, as a Federal Court of the United States, jurisdiction to pass a final judgment or order subjecting to the claim of the plaintiff the funds, assets and credits of the defendant in this cause sought to be attached.

For which errors the plaintiff, the Big Vein Coal Company of West Virginia, prays that the said judgment of the Circuit Court of the United States for the Northern District of West Virginia, be reversed and a judgment rendered in favor of the plaintiff Company for such further proceedings in said Court as to law and justice may appertain, and for costs.

OSBORNE I. YELLOTT,
Attorney for Plaintiff.

33 And on the same day, to-wit: On the 28th day of November, 1911, the following order was made and entered of record, to-wit:

BIG VEIN COAL COMPANY OF WEST VIRGINIA
vs.
BENJAMIN H. READ.

In Debt.

Order Allowing Writ of Error from the Supreme Court of the United States to the Circuit Court for the Northern District of West Virginia.

This 28th day of November, 1911 comes the plaintiff, by George W. Johnson and Osborne I. Yellott, its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and

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papers upon which the judgment herein was rendered, duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $3000.00 which shall operate as a supersedeas bond.

Enter: Nov. 28, 1911.

BENJ. F. KELLER,
District Judge.

Attest:
S. R. HARRISON, *Clerk.*

34

Bond.

(Filed December 2nd, 1911.)

Maryland Casualty Company, Baltimore.

Know all men by these presents: That we the Big Vein Coal Company of West Virginia, as Principal, and the Maryland Casualty Company, a corporation of the State of Maryland, Baltimore, Maryland, as Surety, are held and firmly bound unto Benjamin H. Read of Baltimore City, in the State of Maryland, in the full and just sum of Three Thousand ($3000.) Dollars, to be paid to the said Benjamin H. Read, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of December in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a term of the Circuit Court of the United States for the Northern District of West Virginia in a suit depending in said Court, between the said Big Vein Coal Company of West Virginia, Plaintiff, and the said Benjamin H. Read, Defendant, a final judgment was rendered against the said Big Vein Coal Company of West Virginia and the said Big Vein Coal Company of West Virginia, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Benjamin H. Read having been issued citing and admonishing him to be and appear in the Supreme Court of the United States to be holden at Washington, D. C., within thirty days from the date of such citation.

Now the condition of the above obligation is such, That if the said Big Vein Coal Company of West Virginia, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to

IN CENTER

make its plea good, then the above obligation to be void;
35 else to remain in full force and virtue.

BIG VEIN COAL COMPANY OF
WEST VIRGINIA,
By F. J. TAYLOR, *President.*

Attest:

JOHN C. WOLF, *Secretary.*
[CORPORATE SEAL.]

MARYLAND CASUALTY COMPANY,
[CORPORATE SEAL.] By DAVID F. TURNER,
Attorney-in-Fact.

Attest:

—— ——.

Approved to operate as a supersedeas.

BENJ. F. KELLER,
District Judge of the United States for the Southern District of West Virginia, Specially Assigned.

No. 171.

Power of Attorney from Maryland Casualty Company to —— ——

Know all men by these presents: That Maryland Casualty Company, a corporation created by and existing under the laws of the State of Maryland, of the City of Baltimore, Maryland, and duly authorized to act as sole surety in the State of West Virginia, has made, constituted, and appointed and by these presents doth make, constitute and appoint David F. Turner and H. P. Camden its true and lawful attorney for and on behalf of the said corporation as surety, to make, sign and acknowledge a Bond in the penalty of Three Thousand ($3,000.00) Dollars to be executed by Big Vein Coal Company of West Virginia as Principal conditioned for
36 the successful prosecution of appeal, or payment of judgment and costs in suit of Big Vein Coal Company of West Virginia versus Benjamin H. Read, hereby approving, ratifying and confirming all that its said attorney may do or lawfully cause to be done in the premises by virtue of these presents.

In witness whereof Maryland Casualty Company has caused these presents to be signed by Vice President of said Company and its corporate seal to be hereunto affixed this the twenty-ninth day of November, 1911.

[CORPORATE SEAL.] MARYLAND CASUALTY COMPANY,
By JAS. M. STONE, *Vice President.*

Attest:
ROBERT FERGUSON,
Ass't Secretary.

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Extract from the By-Laws.

Article IV, Section V. The President, or any of the Vice-Presidents, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint any attorney in fact or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto.

I, Robert Ferguson, Asst. Secretary of the Maryland Casualty Company, do hereby certify that the above and foregoing is a full and correct copy of Article IV, Section V, of the by-laws of the Maryland Casualty Company, as the same appears on the records of the Company now in my possession and custody.

In Witness whereof, I have hereunto set my hand and affixed the seal of said company at the city of Baltimore, this twenty-ninth day of November, A. D. 1911.

[CORPORATE SEAL.] ROBERT FERGUSON,
Ass't Secretary.

7 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition the judgment of a plea which is in the said Circuit Court, before ou, or some of you, between the Big Vein Coal Company of West irginia, a corporation, plaintiff, and Benjamin H. Read, defendt, a manifest error hath happened, to the great damage of the id Big Vein Coal Company of West Virginia, as by its complaint ppears. We being willing that error, if any hath been, should be ly corrected and full and speedy justice done to the parties afore-id in this behalf, do command you, if judgment be therein given, at then under your seal, distinctly and openly, you send the cord and proceedings aforesaid, with all things concerning the me, to the Supreme Court of the United States, together with this it, so that you have the same at the city of Washington, on the n day of January next, in the said Supreme Court, to be then and ere held, that the record and proceedings aforesaid being inspected, e said Supreme Court may cause further to be done therein to cor-t that error, what of right, and according to the laws and customs the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

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United States, this 8th day of December, in the year of our Lord one thousand nine hundred and eleven.

[Seal Circuit Court United States, Northern District West Virginia, Parkersburg, West Va.]

S. R. HARRISON,
Clerk of the Circuit Court of the United States for the Northern District of West Virginia.

Allowed by
BENJ. F. KELLER,
District Judge, Holding the Circuit Court of the United States for the Northern District of West Virginia.

37½ Received this Writ at Parkersburg, December 15th, 1911. Executed the same at Parkersburg on December 18th, 1911, by delivering in person to B. M Ambler, Attorney of record for the within named Bejamin H. Read, a duly certified copy of the within writ.

JAMES E. DOYLE,
U. S. Marshal,
Per H. B. DODGE, *Deputy.*

38 *Citation.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

To Benjamin H. Read, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, District of Columbia, within thirty days from and after the day this citation bears date, pursuant to a writ of error allowed and filed in the Clerk's office of the Circuit Court of the United States for the Northern District of West Virginia, wherein the Big Vein Coal Company of West Virginia, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the Big Vein Coal Company of West Virginia as in said writ of error mentioned should not be be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Benj. F. Keller, District Judge, holding the Circuit Court of the United States for the Northern District of West Virginia, this 8th day of December, in the year of our Lord, one thousand, nine hundred and eleven.

[Seal Circuit Court United States, Northern District West Virginia, Parkersburg, West Va.]

BENJ. F. KELLER,
District Judge, Holding the Circuit Court of the United States for the Northern District of West Virginia.

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38½ Received this writ at Parkersburg, December 15th, 1911.
Executed the same at Parkersburg on December 18th, 1911, by delivering in person to B. M. Ambler, Attorney of record for the within named Bejamin H. Read, a duly certified copy of the within writ.

JAMES E. DOYLE,
U. S. Marshal,
Per H. B. DODGE, *Deputy.*

39 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do certify that the foregoing is a true and complete transcript of the record and proceedings of said Court in the case of Big Vein Coal Company of West Virginia v. Benjamin H. Read, lately pending in said Court, as the same appear on file and among the records of my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Parkersburg, in said District, this 20th day of December, 1911.

[Seal Circuit Court, United States, Northern District West Virginia, Parkersburg, West Va.]

S. R. HARRISON, *Clerk.*

Endorsed on cover: File No. 22,988. N. West Virginia C. C. U. S. Term No. 912. Big Vein Coal Company of West Virginia, plaintiff in error, vs. Benjamin H. Read. Filed December 29, 1911. File No. 22,988.

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Supreme Court, U.S.
FILED
DEC 9 1912
JAMES H. McKENNEY,
Clerk.

No. 501.

Supreme Court of the United States

BIG VEIN COAL COMPANY OF WEST VIRGINIA,
Plaintiff in Error,

vs.

BENJAMIN M. READ,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

MOTION [illegible] FOR REARGUMENT, OR MODIFICATION OF JUDGMENT, AND BRIEF IN SUPPORT THEREOF.

[illegible]

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Supreme Court of the United States

October Term, 1911. No. 912.

BIG VEIN COAL COMPANY OF WEST VIRGINIA,
Plaintiff in Error.

vs.

BENJAMIN H. READ,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

MOTION BY THE DEFENDANT IN ERROR TO DISMISS.

Now comes the defendant in error in the above entitled case and moves this Honorable Court to dismiss the writ of error herein for want of jurisdiction, because it appears from the record that the proceeding is one of attachment against a non-resident debtor, and that neither the defendant in error nor the so-called garnishees were found within the district.

Frank Gosnell,
Geo. Weems Williams,
Wm. L. Rawls,
Attorneys for Defendant in Error.

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NOTICE OF SUBMISSION.

BALTIMORE, Md., November 30th, 1912.

To GEORGE W. JOHNSON and
OSBORNE I. YELLOTT,
Attorneys for Plaintiff in Error.

SIRS:

You will please take notice that on Monday, the 23d day of December, 1912, motion to dismiss, of which the foregoing is a true copy, will be duly submitted to the Supreme Court of the United States for its decision thereon. Annexed hereto is a true copy of brief and argument in support of said motion.

Respectfully,

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
WM. L. RAWLS,
Attorneys for Defendant in Error.

Service of copy of motion, brief and argument and notice of submission acknowledged this 30th day of November, 1912.

GEORGE W. JOHNSON,
OSBORNE I. YELLOTT,
Attorneys for Plaintiff in Error.

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BRIEF FOR THE DEFENDANT IN ERROR IN SUPPORT OF

THE MOTION TO DISMISS.

STATEMENT OF FACTS.

On the 26th day of June, 1911, the Big Vein Coal Company, a corporation created under the laws of the State of West Virginia, the plaintiff in error, commenced attachment proceedings in the Circuit Court of the United States for the Northern District of West Virginia against Benjamin H. Read, trading as Lynah & Read, the defendant in error, a citizen of and domiciled in the State of Maryland, to recover an alleged indebtedness of $2,076.78. The writ of subpœna was, on the 27th of July, 1911, returned and endorsed by the Marshal as follows: "Received this writ at Parkersburg, W. Va., July 1st, 1911. RETURNED NOT EXECUTED. DEFENDANTS NOT FOUND IN MY DISTRICT" (Rec. 1-4).

Accompanying the declaration was an affidavit of the plaintiff in error, which was the basis of an order of attachment. This writ of attachment was, on the 27th day of July, 1911, also returned by the Marshal and was endorsed, "Received this writ at Parkersburg, W. Va., July 1st, 1911. Returned Not Executed. After due diligence used in trying to locate property of the within defendant, in my district, upon which to serve this attachment, I am unable to do so, *and return writ not executed;* NO PROPERTY FOUND IN MY DISTRICT" (Rec. 4-6).

It appears from the affidavit above referred to that at the time this proceeding was instituted there was pending on the equity side of the lower Court, a cause entitled Baltimore Trust & Guaranty Company vs. The Oakland Coal & Coke Company, wherein the defendant in error, Benjamin H. Read and Jesse L. Slingluff (also a citizen of the State of Maryland), were ap-

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pointed Receivers of the property of the last named corporation, and that by the report of the special master in said chancery cause there had been allowed to the defendant in error, for his services, as one of said receivers, the sum of $2,000—"that said report has been filed with the clerk of said Circuit Court at Parkersburg, in which the said sum of $2,000 is allowed; *that the Court itself has taken no action upon said report*, and the same still remains in the clerk's office for action thereon by the Court itself" (Rec. 5).

On the same 26th day of June, 1911, an *ex parte* order was made that the defendant plead, answer or demur to the declaration; that "a copy of the order be served upon the defendants wherever found," and that a copy of the order be also served upon Jesse L. Slingluff and Benjamin H. Read, special receivers of The Oakland Coal & Coke Company, in the chancery cause above referred to "which shall be notice to them of this proceeding, and that said claim of the said defendant (his fees for services as receiver) is sought to be attached in this proceeding" (Rec. 7). Upon a copy of this order is the following endorsement: "Served copy of the within Notice and Order of Court on Jesse Slingluff and Benjamin H. Read, Receivers of The Oakland Coal and Coke Company, also served copy on Benjamin H. Read as an individual, AT BALTIMORE, MARYLAND, July 5, 1911. George W. Padgett, U. S. Marshal, per J. Wesley Gilroy, Deputy U. S. Marshal" (Rec. 8, 9).

On the 18th day of October, 1911, the defendant in error entered a *special appearance* "FOR THE PURPOSE ONLY OF OBJECTING TO THE JURISDICTION OF THE COURT," and moved to dismiss the suit and quash the attachment; the reasons assigned therefore may be summarized as follows:

Because the record shows that he is not a citizen or resident of, nor found within the Northern District of West Virginia and that he has no property within said State or District.

Because his commissions as one of the receivers of the Oakland Coal and Coke Company are not liable to attachment.

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Because the Court has no jurisdiction either *in rem* or *in personam* (Rec. 9, 10).

The above motion was on the same day ordered to be filed and was argued before Hon. Alston G. Dayton, District Judge. Subsequently, on the 24th of October, 1911, Hon. Nathan Goff made an order designating and appointing in the place and stead of Judge Dayton, Hon. Benjamin F. Keller, District Judge (Rec. 10). All the subsequent proceedings in the case were had before Judge Keller.

On the 9th of November, 1911, an order was made and entered which recited that the defendant in error

> "AGAIN APPEARED FOR THE PURPOSE ONLY OF OBJECTING TO THE JURISDICTION AND FOR THE PURPOSE OF THE MOTIONS HEREIN ONLY, and further moved the Court to vacate and set aside the orders of Court issued and entered herein, and to quash and set aside the service of the summons and process in this action, and to dismiss the action" * * *

The order then proceeded—

> "And the plaintiff thereupon appeared and resisted said motions by counsel. And thereupon at the request of the plaintiff, and the defendant again denying the jurisdiction of the Court, *and the defendant still limiting his appearance to the purposes aforesaid.* It is ordered that the following facts are admitted by the parties to be true for the purposes of the matters here pending and shall be entered of record—*but without prejudice* to any motion of the defendant AND WITHOUT enlarging the appearance of the defendant" * * * (Rec. 11).

That on the 20th day of June, 1911, the receivership estate of the Oakland Coal & Coke Company being ready for distribution, this Court passed an order in the receivership proceeding, referring the cause to Special Master, C. D. Merrick, with directions among other things to make report "including costs and allowances and fees to the end that a full and complete decree might be made for the distribution and settlement of the estate."

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"On May 15, 1911 the Special Master filed such report. Among other allowances were the following:

> "That Benjamin H. Read, for his services as Receiver, is entitled to and should be allowed the sum of two thousand dollars.
>
> "That no objection had been taken or exceptions made to the above allowance at the time the attachment was laid in this cause.
>
> "That in July, 1911 this Court passed an order ratifying the report of the Master as to the above and similar allowances, but directed that the allowance of $2,000 commissions to B. H. Read be retained by the Receivers, pending the determination of the questions arising out of such attachment" (Rec. 11).

On the 18th day of November, 1911, the following order was passed:

> "This day came the plaintiff by its attorneys, George W. Johnson and Osborne I. Yellott, and the defendant, Benjamin H. Read, appearing specially, by his attorney, B. M. Ambler, *for the purpose only of contesting the jurisdiction of the Court herein;* and the motion of the defendant to quash the order of attachment herein coming on to be heard upon the declaration herein, the process returned unexecuted, the order of Court entered on the 26th day of June, 1911, and the agreed facts set forth in the consent order of November 9, 1911, being argued by counsel is sustained as improvidently awarded by the Clerk. And the order herein on the 26th day of June, 1911, providing for service of a copy thereof on Jesse Slingluff and Benjamin H. Read, Receivers in the equity cause of Baltimore Trust & Guaranty Company vs. Oakland Coal and Coke Company, and upon Benjamin H. Read, individually, is also set aside as improvidently awarded; and the Court being of opinion that it hath jurisdiction of the subject-matter of this action doth decline at this time to dismiss the action, but doth continue the same for service of process" (Record, page 16).

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Upon the same day the Court filed its opinion upon the motion to quash and the same will be found set out at length upon pages 12 to 15, inclusive of the record.

Referring to the order of June 26, 1911, the Court said:

> "This order was served upon the Receiver as such and upon Benjamin H. Read, individually, and in so far as practical effects are concerned, operates as an attachment in the hands of the co-receivers of the sum of $2,000 allowed to Benjamin H. Read for services as a receiver.
>
> "The matter is before me upon the entry of a motion to quash the attachment and dismiss the suit for lack of jurisdiction, such motion being made under a special appearance entered for such purpose only.
>
> "Strictly speaking, THERE HAS BEEN NO LEVY OF AN ATTACHMENT IN THIS CASE as is shown by the return of the Marshal, but the *ex parte* order obtained on June 26, 1911, having the effect of tying up the allowance made of the Master to Benjamin H. Read, Receiver, the motion will be treated as one to set aside and annul said order of June 26, 1911, as improvidently awarded."

After reviewing the statutes governing the issuance of attachments by the Circuit Courts of the United States, and the cases construing those statutes the Court held, that as it appeared that no personal service of process had ever been made upon the defendant within the Northern District of West Virginia, and as such service was absolutely necessary in order to obtain jurisdiction over either the person or property of the defendant, the order of June 26, 1911, attempting to subject the $2,000 to which defendant was entitled as commission as receiver in the chancery case, to what was in effect an attachment, and providing for service of copy of said order outside of said district, was beyond the power and jurisdiction of the Court, and was, therefore, improvidently awarded.

As is shown by the opinion as well as the order passed upon the same day, the Court did not at this time dismiss the suit, but continued the same for further service.

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On November 27, 1911 connsel for plaintiff in error filed a stipulation consenting to the hearing of motions at Clarksburg instead of Parkersburg, upon which stipulation is the following endorsement :

> " Consent to the above is given for the purpose only of arranging for hearing objections to jurisdiction and motions standing on special appearance of plaintiff.
>
> B. M. AMBLER,
> *Attorney for Benjamin H. Read* " (Rec. 16, 17).

On the same day, viz., November 27, 1911, the plaintiff filed his written refusal to direct *alias* process to issue against the defendant, Benjamin H. Read (Rec. 18).

Thereupon the Court on the same day dismissed the action with costs and allowed this writ of error (Rec. 18, 19).

On the 28th of November, 1911, the Circuit Court filed and entered its certificate conformably to the Act of Congress of March 3, 1891, Chapter 517, to the effect that the judgment complained of is based solely on the ground that this Court had no jurisdiction over the defendant or his property in the absence of personal service of summons upon him within the district, or of his voluntary appearance, and that the motion to dismiss the action and quash the attachment herein did not constitute such a voluntary appearance as to give jurisdiction to the defendant or to pass a final judgment or order subjecting to the claim of the plaintiff the funds, assets and credits so sought to be attached (Rec. 18 and 19).

ARGUMENT.

Propositions.

FIRST. THAT THE PROCESS OF ATTACHMENT IN ANY CIRCUIT COURT OF THE UNITED STATES IS ONLY AN AUXILIARY PROCESS, AND BUT AN INCIDENT TO A PRINCIPAL SUIT, WHICH MUST NECESSARILY FALL UNLESS SUCH PRINCIPAL SUIT CAN BE MAINTAINED; AND AS IT APPEARS IN THIS CASE THAT BENJAMIN H. READ, THE DEFENDANT IN ERROR (DEFENDANT BELOW), WAS NEVER SERVED WITH PROCESS WITHIN THE DISTRICT WHERE THE SUIT WAS BROUGHT, NO JURISDICTION WAS EVER OBTAINED OVER EITHER HIS PERSON OR PROPERTY.

SECOND. THAT THE APPEARANCE OF THE DEFENDANT IN THE COURT BELOW WHICH WAS MADE SPECIALLY AND SOLELY FOR THE PURPOSE OF RAISING THE QUESTION OF JURISDICTION, DID NOT CONSTITUTE SUCH A VOLUNTARY APPEARANCE TO THE CAUSE AS TO GIVE THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA ANY JURISDICTION WHATSOEVER OVER EITHER THE PERSON OR THE PROPERTY OF THE DEFENDANT IN ERROR.

THIRD. WHILE UNDER THE STATUTES OF WEST VIRGINIA PROVIDING FOR ATTACHMENT, A DEBT IS ATTACHABLE YET THE DECISIONS OF THE HIGHEST COURT OF THAT STATE CONSTRUING SAID STATUTES (WHICH DECISIONS THIS COURT WILL FOLLOW) ARE TO THE EFFECT THAT IN ORDER TO SUBJECT A DEBT TO ATTACHMENT PERSONAL SERVICE MUST BE HAD UPON THE DEBTOR WITHIN THAT STATE, AND AS IN THIS CASE NO SERVICE WAS EVER HAD UPON THE RECEIVERS IN THE CHANCERY CAUSE WITHIN THE STATE OF WEST VIRGINIA, NO JURISDICTION WAS ACQUIRED OVER THE COMMISSIONS DUE BY THEM TO THE DEFENDANT IN ERROR.

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I.

THAT THE PROCESS OF ATTACHMENT IN ANY CIRCUIT COURT OF THE UNITED STATES IS ONLY AN AUXILIARY PROCESS, AND BUT AN INCIDENT TO A PRINCIPAL SUIT, WHICH MUST NECESSARILY FALL UNLESS SUCH PRINCIPAL SUIT CAN BE MAINTAINED; AND AS IT APPEARS IN THIS CASE THAT BENJAMIN H. READ, THE DEFENDANT IN ERROR (DEFENDANT BELOW), WAS NEVER SERVED WITH PROCESS WITHIN THE DISTRICT WHERE THE SUIT WAS BROUGHT, NO JURISDICTION WAS EVER OBTAINED OVER EITHER HIS PERSON OR PROPERTY.

From the above statement of facts it will be seen that the defendant in error was never served with process of any description within the Northern District of West Virginia, but upon the contrary the record discloses that the return of the Marshal of said district was "Returned Not Executed, Defendant not found in my District" (Rec. 4). Upon the writ of attachment, June, 1911, the return of the Marshal was "Returned Not Executed. After due diligence used in trying to locate property of the within defendant in my district, upon which to serve this attachment, I am unable to do so and return writ not executed, no property found in my district" (Rec. 6).

The fact therefore is that both as to the writ of summons in the principal suit, and as to the incidental writ of attachment so far as the official return upon them is concerned, no service at all was ever made and no jurisdiction whatever was ever acquired under them either over the defendant in error or over his property.

The only ground upon which the plaintiff in error bases its claim that the Circuit Court had jurisdiction, is upon the order passed *ex parte* on June 26, 1911. This order recited that it appeared to the Court from the inspection of the declaration, pleading, affidavits, and papers filed in the case that the plaintiff claimed from the defendant, the sum of $2,075.58, that the defendant was a non-resident of the State of West Virginia, that the Special Commissioner, C. D. Merrick [in the receiver-

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ship cause] had found due to the defendant, the sum of $2,000 as Special Receiver for services rendered as such, in said cause, along with Jesse Slingluff, Co-Receiver, and that the plaintiff had proceeded under Chapter 106 of the Code of West Virginia to have said sum attached on account of its said claim; that the plaintiff had caused the clerk of said Court to issue an order of attachment and place the same in the hands of the Marshal of the said Northern District of West Virginia, for service, for the purpose of attaching the estate of the defendant, to answer the claim set up in said cause. The order then continued:

> "On consideration whereof it is ordered that the said defendant do appear before this Court, in the Northern District of West Virginia, at Parkersburg, in said District, to plead, answer or demur to the declaration in this cause filed on or before the August rules 1911. It is further ordered that a copy of this order be served upon said defendant wherever found. It is further ordered that a copy also be served upon Jesse L. Slingluff and Benjamin H. Read, Special Receivers in the Chancery Cause of The Baltimore Trust & Guarantee Company vs. The Oakland Coal and Coke Company, which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached in this proceeding" (Rec. 7).

As above stated a copy of the Notice and Order were served on Jesse Slingluff and Benjamin H. Read, Receivers, and upon Benjamin H. Read as an individual at Baltimore, Maryland.

It therefore appears that no service of process of any notice whatsoever was ever had upon the defendant in error *within the Northern District of West Virginia*, and that the only paper ever served upon him was the order of June 26, 1911, before mentioned, copy of which was served upon him *in the City of Baltimore* and of course without the jurisdiction of the Court below.

The defendant in error contends that the Circuit Court was right in holding upon this state of the record that it had acquired no jurisdiction over either his person or property.

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The only authority for the issuing of the writ of attachment from any Circuit Court of the United States is found in Section 915 of the Revised Statutes of the United States which section is as follows:

> "In common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State, in which such Court is held, for the Courts thereof; and such circuit or district Courts may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

The uniform construction of this section of the revised statutes has been to the effect, that it does not confer jurisdiction upon the circuit or district Courts over any cases which they do not otherwise possess, and does not in any wise dispense with the personal service of process, which is necessary in all cases in order to acquire jurisdiction over either the person or the property of the defendant, but that it simply gives to the plaintiff in cases, in which the Court has properly acquired jurisdiction by personal service the right to the auxiliary remedy by attachment. It is an incident to a suit over which jurisdiction has already been acquired and does not itself afford a means of acquiring jurisdiction.

In construing Section 915, Revised Statutes, in *Ex parte Railway Co.* 103 U. S. at page 796, this Court said, *Mr. Chief Justice Waite* delivering the opinion:

> "Under Section 739 of the Revised Statutes, no civil suit, not local in its nature, can be brought in the Circuit Court of the United States, against an inhabitant of the of the United States by original process, in any other State than that of which he is an inhabitant, or in which he is found at the time of serving the writ. It is con-

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ceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and unless he could he sued no attachment could issue from that Court against his property. An attachment is but an incident to a suit and unless the suit can be maintained, the attachment must fall."

In *Nazro vs. Cragin*, 3 Dillon, 474, it was sought to attach property in a district other than that of the residence of the defendant, without personal service of process upon him, and it was contended by the plaintiff that jurisdiction in such case was conferred upon the Court issuing the attachment by Section 6 of the Act of June 1, 1872 (17 Stats. at Large, 196); now Section 915 of the Revised Statutes.

Mr. Justice Miller, sitting at Circuit, answered this contention as follows:

"It is next urged that the jurisdiction asserted by the district Court is conferred by Section 6 of the Act of June 1, 1872 (17 Stats. at Large, 196). But in my judgment this is a mistaken notion of the design of this section. It does not repeal the limitation in the judiciary Act. Prior to the legislation of 1872, just noticed, the federal courts, *by rule* generally adopted the State laws as respects attachments of property, but it was never supposed that jurisdiction could be exercised without personal service on the defendant made within the district. The Statute of 1872 adopts existing provisions of the State laws in this regard and gives the Court power, by rule, to adopt provisions subsequently enacted by the States; but in my opinion, it was not intended by Congress to make the great change for which the assignee's counsel here contends. It would compel citizens of the Pacific Coast to go to New York to defend their property which happened to be there and would give the great central cities vast power. I cannot but think that a change so radical would have been expressed by Congress in unmistakable language. And this view is

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strengthened by the consideration that no publication is provided for by the section under consideration, while a subsequent section of the same act does provide for publication in respect to certain suits in equity.

"The effect of this section in the Act of 1872 is simply this: If the Court has or can acquire jurisdiction over the defendant personally, this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction."

It was contended in the Court below by counsel for plaintiffs in error that the decision in *Ex Parte Railway Co.* (*supra*) was not controlling in the case at bar, because that decision was rendered prior to Act of Congress of March 3, 1887, which was subsequently amended and corrected by Act of August 13, 1888, Chapter 866, 25 Stat. L. 433, and that Section 1 of that Act dispensed with personal service of the defendant in attachment cases where suit was brought in the district where the plaintiff resides, but in this the learned counsel is clearly in error.

At the time of the decision of *Ex Parte Railway Co.*, Section 1 of the Act of March 3, 1875, Chapter 137, 18 Stat. at Large, 470, was in force, which section provided as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district Court; and no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding."

This Court in that case held that this section read in connection with Section 915, required personal service upon the defendant within the district where the suit is brought, before jurisdiction could be acquired over either the person or property of the defendant.

Section 1 of the Act of March 3, 1887, Ch. 373, as amended and corrected by the Act of August 13, 1888, Chapter 866; 25 Stat. at Large, 433, provides:

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> "And no civil suit shall be brought before either of said Courts against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In a case very similar to the one at bar arising after the enactment of the section just quoted, where it was contended that jurisdiction over property of a defendant could be obtained without personal service upon the defendant in the district of the residence of the plaintiff, where the State law gave the right of attachment without such personal service, Judge Shipman answered such contention as follows:

> "The statute of March 3, 1887, introduced no new principle which obviated the necessity of personal service. It provided that suit, when jurisdiction is founded upon diverse citizenship, must be brought in the district either of the residence of the plaintiff or of the defendant; and it omitted the provision that the defendant could be sued in any district in which he should be found at the time of serving the writ; but it by no means intended to discard the long-established doctrine that the defendant must be legally found and served in the district in which he is sued. The conclusions in *Toland vs. Sprague, supra*, in regard to the scope of the Federal statutes which existed at the time of that decision, are still applicable."
>
> *Harland vs. United Lines Tel. Co.*, 40 Fed. Rep. at page 312.

In the case of *Toland vs. Sprague*, 12 Peters, 300, referred o in the quotation just made the following proposition was announced, which it is submitted controls the case at bar.

> "(4) That the right to attach property, to compel the appearance of persons can properly be used only in cases in which such persons are amendable to the process of the Court *in personam*; that is where they are inhabitants, or found within the United States; and not where they are

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aliens or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here: and we add that, even in case of a person, being amendable to process *in personam*, an attachment against his property cannot be issued against him, except as part of, or together with, process to be served upon his person."

In *Laborde vs. Ubarri*, 214 U. S. 173, this Court reiterated the principle laid down in *Ex Parte Railway Co., supra*, and cited that case with entire approval. At page 174, this Court speaking through *Mr. Justice Holmes*, said:

"This is the same suit that has been decided already. *Ubarri vs. Laborde, ante*, page 168. There is presented here a subordinate question as to the right of the plaintiffs in error, who were also the plaintiffs below, to retain an attachment against property alleged to belong to two non-resident heirs of Pablo Ubarri. The District Court ordered the complaint to be dismissed as to these heirs and the attachment against any of their property to be dissolved, on the principle that has been laid down more than once by this Court, that in the Courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' *Ex parte Railway Co.*, 103 U. S. 794, 796. 'Unless the suit can be maintained' means of course, unless the Court has jurisdiction over the person of the defendant. See further *Toland vs. Sprague*, 12 Pet. 300, 330, 336; *Chaffee vs. Hayward*, 20 How. 208; *Clark vs. Wells*, 203 U. S. 164."

In *U. S.* vs. *Brooke et al.*, 184 Fed. Rep. 341, it is held by Hazel, D. J., that since common law actions can only be brought in a Federal Court in the district in which the defendant is an inhabitant, or in which he is found at the time of the serving of the process, unless he voluntarily appears, an action cannot be maintained by the United States against a non-resident in a Federal Court by attaching defendant's property within the jurisdiction, without personal service of summons, notwithstanding Rev. St. Sec. 914 and Sec. 915, saying:

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"The attachment granted herein must be vacated on the ground that jurisdiction has not been obtained over the person of the defendants. According to the moving papers, the defendants are residents of Huddersfield, England, and are not residents of the State of New York, and cannot after due diligence be found therein or within the United States. The return of the Marshal certifies that he is unable to find the defendants or either of them within the Southern district of New York.

"The authorities uniformly hold that to merely find property of a defendant in the district does not mean finding the defendant therein, for the purpose of bringing suit against him. By Section 914 of the statutes of the United States (U. S. Comp. St. 1901, p. 684), it is provided that the practice and mode of procedure in federal cases, other than equity and admiralty cases, conform to those of the respective States wherein such actions are brought, and by Section 915 the same remedies by attachment are authorized in this Court as are provided by the laws of the State in which the Court is held. But such provisions do not expressly or impliedly give a United States District Court jurisdiction of proceedings *in rem* against the property of a non-resident defendant who has not been personally served. The Supreme Court has held that the attachment is only an incident of the suit. *Ex parte Railway Company*, 103 U. S. 794, 26 Ld. 461; *Laborde vs. Ubarri*, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. Ed. 955. And common law actions can only be brought in the United States Circuit and District Courts in the district of which the defendant is an inhabitant, or in which he is found at the time of serving the process, or, to give the Court jurisdiction, he must voluntarily appear. *Toland vs. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Anderson vs. Shaffer*, 10 Fed. 266; *Erstein vs. Rothschild*, 22 Fed. 61; *Lovejoy vs. Hartford Ins. Co.* (C. C). 11 Fed. 63; *Boston Electric Co. vs. Elec. Gas Ltg. Co.* (C. C). 23 Fed. 838; *Noyes vs. Canada* (C. C). 30 Feb. 665; *Harland vs. United Lines Tel. Co.*, 40 Fed. 308, 6 L. R. A. 252. Several of the cases cited squarely hold that remedies by attachment do not give United States Courts jurisdiction unless such jurisdiction was first obtained by proper service of process or the voluntary appearance of the defendant."

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It is of course to be remembered that the case now before this Court was begun in the United States Circuit Court for the Northern District of West Virginia, and is not a case *removed* from a State Court. Those cases, therefore, which hold that where an attachment proceeding which is begun in a State Court under State statutes authorizing it, without personal service, may be continued after removal to the Federal Court and the property attached bound by the judgment rendered, even where there was no personal service upon the defendant within the district, have no application to the case at bar.

Clark vs. Wells, 203 U. S. 164.
Davis vs. C. C. C. & St. L. R. Co., 217 U. S. 157.
Foster's Federal Practice, page 1254.
Central Trust Co. vs. Chattanooga R. & C. R. Co., 68 Fed., at page 695.

In the case last cited it is said at page 695:

"The case in hand being instituted in this Court, involves the question how far the remedy by attachment is available in the Courts of the United States in the exercise of original jurisdiction. It avoids possible confusion to keep in mind the distinction between cases wherein the validity of attachment proceedings in State Courts is considered, as in *Cooper vs. Reynolds* and *Pennoyer vs. Neff*, and those in which the question of the extent to which the Courts of the United States can entertain jurisdiction of an attachment suit is discussed, as in *Toland vs. Sprague*, 12 Pet. 300, and *Ex parte Railroad Company*, 103 U. S. 794. No legislation of Congress has provided or attempted to provide an attachment remedy in the Federal Courts like those existing by statute in the States, except to the extent noticed further on. And the provision, 'But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court,' has been continued without interruption in all the judiciary acts from that of 1789 to the Act of 1888. Process served on the defendant within the district or voluntary appearance, is necessary, and the process of foreign attachment cannot give jurisdiction without such service or appearance."

In 4 Cyclopedia Law and Procedure at pages 460 and 461 the distinction here referred to is clearly stated as follows:

> "Federal Courts have jurisdiction to issue attachments according to the form and manner of procedure of the state where the Court sits, where defendant can be served with process; but where defendant is not a resident of the district, a Federal Court cannot acquire jurisdiction to entertain original suit against him by attachment of his property within the district. Jurisdiction of the person by service of process or appearance is necessary and this rule is not changed by the provision of the United States revised statutes which authorizes the practice and modes of procedure and remedies by attachment in the Federal Courts which are provided for by state laws. If however a state Court has acquired jurisdiction of the case to the extent of being entitled to enforce its judgment against the property attached, the Federal Court will not, where the non-resident has voluntarily removed the case, allow him to dismiss it as to that property, on the sole ground that the latter Court could not have acquired original jurisdiction of such property by the issue of an attachment."

Before closing the discussion upon this, the main question involved in the case, a word should be said upon the way in which the case was finally disposed of in the Court below.

After the service of the order of June 26, 1911 upon the defendant in error, in the city of Baltimore, the record shows that on the 18th day of October, 1911, he "appeared in Court for the purpose only of objecting to the jurisdiction of the Court in this case, and moves the Court to dismiss the suit and quash the attachment herein, on the grounds following: * * *" (Rec. 10). The matters arising upon this motion were then argued and submitted to the Court (Ibid.). In ruling upon this motion *Keller*, District Judge said (italics and small caps ours):

> "The matter is before me upon the entry of a motion to quash the attachment and dismiss the suit for lack of jurisdiction, such motion being made under a special appearance entered for such purpose only.

> "*Strictly speaking there has been no levy of an attachment in this case as is shown by the return of the marshal,* but the *ex parte* order obtained June 26, 1911 having the effect of tying up the allowance made of the Master to Benj. H. Read, Receiver, the motion will be treated as one to set aside and annul said order of June 26, 1911, as improvidently awarded."

After reviewing the authorities the learned judge reached the conclusion that no jurisdiction over the property of the defendant had been obtained by the Court, the defendant not having been served with process in the Northern District of West Virginia.

Accordingly, the order of June 26, 1911 was set aside as improvidently awarded. The cause, however, was continued so that the plaintiff might resort to an *alias*, but this he declined to do and consequently the suit was dismissed (Rec. 18).

It therefore appears from the record that the Court did not dismiss the case merely because it found that the order of June 26, 1911, was improvidently awarded, by reason of the fact that the Court had no power to subject to attachment the fund in the chancery suit without personal service of process upon the defendant within the district, but that the suit was not dismissed until after the plaintiff filed its written refusal to direct further process. The original process having given the Court no jurisdiction, as the Marshal had returned thereon that he could not find either the defendant or any of his property within the district, the only thing open to the Court in view of the action of the plaintiff in error in refusing to direct a further writ to *issue* was to dismiss the case.

We submit that the lower Court was entirely right in holding that it had no jurisdiction to subject to attachment the property of the defendant in error, no personal service having ever been had upon him within its jurisdiction.

II.

THAT THE APPEARANCE OF THE DEFENDANT IN ERROR IN THE COURT BELOW FOR THE PURPOSE OF RAISING THE QUESTION OF JURISDICTION WAS A SPECIAL APPEARANCE AND DID NOT CONSTITUTE SUCH AN APPEARANCE TO THE CAUSE AS TO GIVE THE CIRCUIT COURT ANY JURISDICTION WHATSOEVER OVER EITHER HIS PERSON OR HIS PROPERTY.

Upon pages 9 and 10 of the record there will be found the special appearance of the defendant, which expressly limits that appearance to "the purpose only of objecting to the jurisdiction of the Court in this case," etc. It concludes with the statement: "And the said defendant limiting his appearance to the express and only purpose of objection to the jurisdiction of this Honorable Court he moves that the said action be dismissed, and the said attachment be quashed and discharged."

The grounds set forth in the motion to dismiss the suit and quash the attachment filed under this special appearance of the defendant in error were each a denial of the jurisdiction of the Court over either the person or property of the defendant in error. At every step in the hearing of this motion the defendant limited his appearance to this specific purpose. See order of Court of November 9, 1911 (Rec. 11), and opinion of *Keller*, District Judge (Rec. 13).

That a special appearance such as was made in the case at bar does not amount to a general appearance so as to give the Court jurisdiction where it had none before is conclusively settled by this Court in the case of *Davis vs. C. C. C. & St. L. Ry.*, 217 U. S. 157, at page 174.

There the plaintiff in error brought an action in the District Court of Woodbury county, State of Iowa, against the *Cleveland, Cincinatti, Chicago & St. Louis Ry. Co.* for causing the death of his testator, Jandt, and under the laws of the State of Iowa writs of attachment and garnishment were issued and levied upon certain cars of the said Railway Company found in the said

State of Iowa. Notice of suit and of attachment and garnishment was served upon the Railway Company at its principal place of business in the State of Ohio.

The defendant railway company being a corporation organized under the laws of the State of Indiana, filed a petition for removal of the action to the Circuit Court of the United States for the Northern District of Iowa, Western Division.

After the granting of the petition for removal the defendant railway company filed a motion, which was denominated a motion to quash and set aside service, in which it stated that it appeared specially for the purpose of the motion only "to quash and set aside the service of the attachment and garnishment attempted to be made in the cause of plaintiff against the defendant's property." This motion was supported by affidavit, in which certain facts were set forth as a basis for the exemption of the property in question from garnishment and attachment.

The Circuit Court sustained the motion to quash and set aside the service of the attachment and garnishment, and upon a certification of the question of jurisdiction to this Court, the contention was made by the plaintiff in error, that the special appearance of the defendant in error under the circumstances of the case amounted to a general appearance, and that thereby the defendant in error had submitted its person to the jurisdiction of the Court. Upon this question this Court said:

> "We cannot concur in the contention. It is supported, it is true, by some cases, but it is opposed by more. Drake on Attachments, 112, and cases cited. The stronger reasoning, we think, too, is against the contention. A Court without personal service can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over property it should be open to the defendant to specially appear to contest its control over such property; in other words to contest the ground of its jurisdiction. *Harkness vs. Hyde*, 98 U. S. 476; *Railway Co. vs. Denton*, 146 U. S. 206; *Goldey vs. Morning News*, 156 U. S. 518, 523; *Railway Co. vs. Brow*, 164 U. S. 271, 278.

"The appearance of the C. C. C. & St. L. Ry. Co. was not to object to the subject matter of the action, as it is contended by plaintiff. The subject-matter of the action is a demand for damages, which can only be prosecuted to efficient judgment and be satisfied out of the property attached. *Clark vs. Wells*, 203 U. S. 164. The jurisdiction of the Court, therefore, depended upon the attachment, and the appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in Court through its property, and it appeared specially to show that it was improperly in Court."

To the same effect are the following cases:

Clark vs. Wells, 203 U. S. 164.

Nazro vs. Cragin, 3 Dillon, 474.

III.

WHILE UNDER THE STATUTES OF WEST VIRGINIA PROVIDING FOR ATTACHMENT, A DEBT IS ATTACHABLE, YET THE DECISIONS OF THE HIGHEST COURT OF THAT STATE CONSTRUING SAID STATUTES, (WHICH DECISIONS THIS COURT WILL FOLLOW) ARE TO THE EFFECT THAT IN ORDER TO SUBJECT A DEBT TO ATTACHMENT PERSONAL SERVICE MUST BE HAD UPON THE DEBTOR WITHIN THAT STATE, AND AS IN THIS CASE NO SERVICE WAS EVER HAD UPON THE RECEIVERS IN THE CHANCERY CAUSE WITHIN THE STATE OF WEST VIRGINIA NO JURISDICTION WAS ACQUIRED OVER THE COMMISSIONS CLAIMED TO BE DUE THE DEFENDANT IN ERROR BY SAID RECEIVERS.

The authorities are clear upon the proposition that the Federal Courts will follow the decisions of the State Court construing its statute providing for attachment proceedings.

In *Perez vs. Gernaudez* 202 U. S. 80 at page 98 it was said by this Court, *Mr. Justice Day* delivering the opinion.

"Circuit Courts of the United States are not governed by any separate attachment law, but are required to

administer the remedy in attachment provided in the laws of the State in which the Courts are held. *Bates et al. vs. Days*, 17 Fed. Rep. 167."

In the case of *People's Savings Bank and Trust Co. vs. Batchelder Egg Case Co.*, 51 Fed. Reporter, 130, decided by the Circuit Court of Appeals for the Eighth Circuit, it was said at page 134 :

> "The decisions of the Supreme Court of a State, construing and applying its attachment laws, are rules of decision in this Court in like cases, coming from that State."

See further—

Fleitas vs. Cockrun, 101 U. S. 301-304.
Lehman vs. Berdin, 5 Dill. 340.
Third National Bank vs. Teal, 5 Fed. Rep. 503.
Russia Cement Co. vs. Le Page Co., 174 Mass. 349.

Remembering therefore the fact that the receivers in the Chancery cause from whom the debt, if any, which it was sought to subject to the operation of these attachment proceedings were not residents of the Northern District of West Virginia, and were not served with any process of any character at all within that district but were served with the order of Court of June 26, 1911, without said district in the City of Baltimore, we look to the decisions of the West Virginia Court of Appeals to see whether under the Statutes of that State such a service has any validity whatsoever.

In the case of *Penna. R. R. Co.* vs. *Rogers*, 52 W. Va. 450; 62 L. R. A. 178, it was held that—

A non-resident, temporarily in the State, may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a non-resident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless, when garnished, he has in the State property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the State.

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That a debt due from a foreign railroad corporation operating no railroad in the State, and doing no business there other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the State, is beyond the territorial jurisdiction of the Courts of the State, and not subject to garnishment there.

That the garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings.

And that a garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid.

The rule is otherwise in Maryland. There one is subject to garnishee process if found and served in the State, even though only there temporarily and irrespective of the original *situs* of the debt.

Savin vs. Bond, 57 Md. 228.
Harris vs. Balk, 198 U. S. 215.

THE SERVICE UPON THE DEFENDANT AND THE RECEIVERS WITHOUT THE DISTRICT, HAD UNDER THE STATUTE (WEST VIRGINIA CODE, PAGE 27, *infra*) NO OTHER GREATER OR DIFFERENT EFFECT, THAN AN ORDER OF PUBLICATION, DULY POSTED AND PUBLISHED AGAINST THEM.

The State Statutes bearing upon the questions involved herein will be found in the West Virginia Code, Annotated 1906, and are as follows:

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Ch. 106, § 5, page 1416.

"5. Every attachment issued under the provisions of this chapter, may be levied upon any estate, real or personal, of the defendant named therein, or so much thereof as is sufficient to pay the amount for which it issues, except that an attachment issued under the third section [against fraudulent lessee] shall be levied on personal estate only. The plaintiff may, by an endorsement on the order, designate any person as being indebted to, or having in his possession, the effects of the defendant, or one of the defendants; and in such case the clerk shall make as many copies of the order as there are persons designated, with an endorsement thereon that the person so designated is required to appear at the next term of the Court in which the action or suit is pending, and disclose on oath in what sum he is indebted to the defendant, and what effects of the defendant he has in his hands; and it shall be sufficiently levied on such person by delivering him a copy of the order and endorsement, or by a service thereof upon him in the same manner as a notice may by law be served; and if the same be levied upon real estate, it shall be sufficiently served by an endorsement thereon, or upon a paper annexed thereto, stating as near as may be, or the supposed quantity, and the location thereof."

Ch. 106, § 7, page 1418.

"7. The officer serving the attachment shall make return of the time and manner of service on each person designated as being indebted to, or having in his possession, the property of any such defendant; and shall also return a list and description of the property taken (if any) under such attachment, and likewise the date of the service, or execution thereof, on each person and parcel of property."

Ch. 124, § 3, Page 1510.

"3. If at the return day of any process it be not returned executed, an *alias* or other proper process may be issued without waiting (where the first process is returnable to a term) for the subsequent process to be awarded at rules. And where, for want of return of the first process against

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a defendant, any subsequent process is issued, if the former was executed, the officer shall not execute the latter, but shall return the former if it is in his possession, and if he has it not, shall return the latter with an endorsement of the execution of the former, and the proceedings thereupon shall be as if the first had been duly returned."

Ch. 124, § 13, page 1515.

"13. When such order shall have been so posted and published, if the defendants against whom it is entered, or the unknown parties, shall not appear at the next term of the Court, after such publication is completed, the case may be tried or heard as to them. Personal service of a summons, *scire facias*, or notice may be made on a non-resident defendant out of this State, which service shall have the same effect, and no other, as an order of publication, duly posted and published against him. In such case the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this State. Upon any trial or hearing under this section, such judgment, decree or order shall be entered as may appear just."

For the reasons above assigned we respectfully move that the writ of error be dismissed.

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
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Attorneys for Defendant in Error.

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No. 501.

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Supreme Court of the United States.

~~October Term, 1911. No. 912.~~

BIG VEIN COAL COMPANY OF WEST VIRGINIA,
Plaintiff in Error.

vs.

BENJAMIN H. READ,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

REPLY BRIEF OF PLAINTIFF IN ERROR TO MOTION BY THE DEFENDANT IN ERROR TO DISMISS

OSBORNE I. YELLOTT,
Attorney for Plaintiff in Error.

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STATEMENT OF FACTS.

This case clearly raises two questions.

First, whether or not an attachment against a non-resident can validly issue out of and be maintained by a United States Circuit Court in the absence of personal service of summons upon the defendant within the district, or of his voluntary appearance, and

Second, Whether or not the motion to quash filed in this cause for the principal and ostensible purpose of raising the question of the Court's jurisdiction to maintain the suit, did in fact, operate as a submission to the jurisdiction of the Court upon the merits of the case.

The record shows that the defendant in error was a resident of the State of Maryland and was indebted to the plaintiff in error, a corporation incorporated under the laws of West Virginia in the sum of $2,076.78; that the plaintiff in error instituted non-resident attachment proceedings upon such claim in the Circuit Court for the Northern District of West Virginia and attempted to attach the sum of $2,000 in the hands of Jesse L. Slingluff and Benjamin H. Read, Receivers, which had been allowed the defendant in error in a Special Master's report in a chancery cause depending in said Circuit Court for the Northern District of West Virginia, which allowance had not been excepted to, although the Special Master's report had been filed more than thirty days before the institution of such attachment proceedings, but which had not been finally ordered by the Court to be paid over to said defendant in error; that said receivers, in whose hands such fund was sought to be attached were residents of the State of Maryland, wherefore the Marshal returned the writ of attachment unexecuted, whereupon said Court passed an order reciting the allowance of $2,000 to the defendant in error by the report of the Special Master as aforesaid, and the institution of the proceedings designed to attach the same, and directed that a copy of such order be served upon said receivers, "which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached in this proceeding." (Record, p. 7.)

Thereupon the defendant in error appeared ostensibly and avowedly for the purpose of objecting to the jurisdiction of the Court in the premises, and filed a motion to dismiss the suit and quash the attachment issued therein on the grounds that the defendant in error was a non-resident of the Northern District of West Virginia, that he had no property therein, and that such Court had no jurisdiction in rem or in personam in said action.

He then continued and for an additional reason why the suit should be dismissed and the attachment quashed, said:

"Fifth, The fund or compensation ordered by this

Hororable Court to be paid to the defendant **for services as Receiver** was not, at the time of the issuance of said writs or at any time since then, liable to be attached upon the alleged indebtedness of the plaintiff or for the payment thereof; in this Honorable Court." (Record, pp. 9-10.)

The Honorable Benjamin F. Keller, District Judge, specially assigned, heard argument upon this motion to quash and sustained the same.

His opinion appears in the Record, at pages 12 to 15. He thereupon filed an order to such effect but declined to dismiss the action, continuing the same for service of process. (Record, p. 16.)

Thereupon the plaintiff in error, conceiving that service of process was unnecessary to maintain said attachment proceedings, refused to direct alias process (Record, p. 17), whereupon the Court passed an order dismissing the action. (Record, p. 18.)

The assignment of errors appears in the Record at pages 19 and 20, the substance of the same being that the lower Court erred in holding and deciding:

First, That it had no jurisdiction to maintain the attachment against the property of the defendant in error in the absence of personal summons within the district or of his voluntary appearance.

Second, That the motion to quash did not constitute such a voluntary appearance as to give the Court jurisdiction to render a personal judgment against the defendant in error.

Third, That the motion to quash did not constitute such a voluntary appearance as to give the Court jurisdiction to pass a final judgment or order subjecting to the claim of the plaintiff the fund sought to be attached.

We shall argue these propositions in the order stated.

In addition thereto the defendant in error raises a question in his brief as to the efficacy of the service of the Court's order upon the receivers outside the Northern District of

West Virginia, claiming that the service of such order upon the receivers out of the District did not constitute a valid attachment of the fund.

We somewhat doubt whether this point is before this Court for review in this proceeding, but nevertheless discuss the same briefly in the Third subdivision of this argument.

ARGUMENT.

I.

That the Circuit Court of the United States for the Northern District of West Virginia had jurisdiction to grant the plaintiff in error (the plaintiff below) relief in this cause by way of a judgment or final order subjecting to the claim of said plaintiff in error the funds, assets and credits of the defendant sought to be attached in this cause, notwithstanding there was no personal service of summons in said proceeding upon the defendant within said Northern District of West Virginia.

We concede that upon this proposition all the text-books are contrary to our contention, and that there have been numerous decisions of the United States District and Circuit Courts to the contrary. But we have been able to find no decisions of any of the Circuit Courts of Appeals nor of this Court contrary either to the proposition itself or in conflict with the reasoning upon which we base the same.

Without a single exception every decision against such proposition is based either directly or ultimately upon three decisions of this Court rendered long prior to the change in the Judiciary Act made by the Act of March 3rd, 1887 as amended and corrected by the Act of August 13th, 1888, Ch. 866, 25 Stat. L.433. And it is wholly upon this change in the Judiciary Act when read in connection with the Act of June 1st, 1872, 915 Rev. Stat., that we base our contention.

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The three decisions which we refer to are

Toland vs. Sprague, 12 Peters, 300 decided in 1838

Chaffee vs. Hayward, 20 Howard, 208 decided in 1857, and

Ex Parte, R. R. Co. 103 U. S. 794 decided in 1881.

When the case of Toland vs. Sprague was decided in 1838, the only Act of Congress which might in any way be taken to bear one way or the other upon the right of a plaintiff to issue a non resident attachment was section 11 of the Judiciary Act of 1789 as amended by the Act of March 2nd, 1793, and which read as follows:

> "Sec. 11. * * * And no civil suit shall be brought before either of said Courts, (Circuit or District) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall have been found at the time of serving the writ."

And in the case of Toland vs. Sprague, this Court decided that in view of this Statute, a person could not be sued except in the district of which he was an inhabitant or in which he could be found at the time of serving the writ. Hence as a non-resident attachment necessarily involved a suit against a non-resident, it followed that a non-resident attachment could not issue out of the Federal Courts.

Then came the decision in the case of Chaffee vs Hayward, decided in 1857, and being to the same effect. Meanwhile there had been no change in the statutory law on the subject, and hence there was no reason for any change in the decision rendered in the case of Toland vs. Sprague.

These two cases were frequently followed by numerous decisions of the lower Courts for many years.

Then came the Act of June 1st, 1872, 915 Rev. Stat, reading as follows:

> "In common law causes in the Circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State, in which such Court is held, for the Courts thereof; and such circuit or district Courts

> may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process; Provided, that similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Shortly thereafter the Judiciary Act of 1789 was amended slightly by the Act of March 3rd, 1875, Ch. 137, 18 Stat. 470, and made to read as follows, the changes being indicated by heavy-faced type.

> "Sec. 1. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against **any person** by any original process or **proceeding** in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving **such process or commencing such proceeding.**"

With the passage of these two acts, the one expressly authorizing attachments out of the Federal Courts and the other having apparently been modified to permit that form of procedure but still providing that a person could only be sued in the district of which he was an inhabitant, or in which he was found, came an opportunity again to raise the question of the right to a non-resident attachment out of a district or circuit court.

And the question was promptly raised and decided in 1881 by the opinion of this Court in Ex Parte R. R. Co. 103 U. S. 794. In that case Mr. Chief Justice Waite delivered the opinion of this Court, and held:

1st. That an attachment is but an incident of a suit;

2nd. That unless the suit can be maintained, the attachment must fall;

3rd. That Sec. 793 of the Revised Statutes (being above quoted as the Act of March 3rd, 1875) was still in force and provided that no person could be sued except in the district of which he was an inhabitant or in which he could be found;

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4th. That by reason of this Statute the suit itself, of which the attachment was but an incident, could not be maintained, and hence the attachment could not be maintained.

Certainly no fault could be found with such a decision. Congress had said attachments might issue out of the district and circuit courts. But by continuing in force the statute providing that a person could only be sued in the district of which he was an inhabitant or in which he might be found, Congress said in the same breath that a suit against a non-resident would not lie.

But then came a further amendment to the Judiciary Act, the Act of August 13th, 1888, Ch. 866, 25 Stat, L. 433:

> "And no civil suit shall be brought before either of said courts against any person by an original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendants."

We are well aware of the many cases construing this amendment, in some of which it has been held that the purpose of this amendment was to restrict rather than to enlarge the jurisdiction of the Federal Courts, in that whereas formerly a defendant might be sued wherever found, regardless of the residence of the plaintiff, now, if out of his own district, he could only be sued if he happened to be within the district of the plaintiff's residence, and that the amendment was not designed to enlarge the jurisdiction of the Federal Courts by permitting them to issue process beyond their jurisdictional limits.

All that may well be true, and still not meet the proposition which we advance.

Congress must be presumed to pass laws with some knowledge at least of the laws already on the statute-books. The full purpose of laws can seldom safely be stated in advance of conditions arising which are literally covered by such laws.

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The purpose of the amendment of 1888 might well have been to restrict the jurisdiction of the Federal Courts by eliminating that large class of cases which had previously arisen where defendants were sued in the Federal Courts wherever found, regardless of the actual residence of either of the parties.

And yet, while restricting such jurisdiction in that respect, Congress may at the same time have intended to enlarge that jurisdiction in respect to attachment suits.

By the Act of 1872 it had already recognized the advisability of enlarging the jurisdiction of the Federal Courts in respect to attachments. Attachments had been recognized by all the States as a desirable form of remedy, in that they enabled creditors to subject the property of their debtors to the payment of their just debts with the minimum of delay, inconvenience and expense to such creditors. Congress recognized this as a desirable feature in the procedure of the State Courts, and determined to engraft it upon the procedure of the Federal Courts. It had its disadvantages in giving the Federal Courts more labor. But it had the advantages of giving the people more adequate remedies, and was directly in line with the spirit of progress which has made our Federal Courts the boon which they are today to the people of our nation.

What reason have we then to believe that Congress did not intend by the passage of the Act of 1888 further to enlarge the jurisdiction of those Courts in respect to attachments?

The Act of 1872 relating to attachments was certainly broad enough, standing by itself, to cover cases of non-resident attachments:

> "In **common law causes** in the circuit and district courts, **the plaintiff shall be entitled to similar remedies by attachment or other process,** against the property of the defendant, **which are now provided by the laws of the State,** in which such Court is held, for the Courts thereof;"

Practically all the State laws provided for non-resident attachments.

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But the Judiciary Acts of 1789 and 1875 stood in the way prior to 1888. They expressly prohibited suits of any kind against non-residents.

But these Judiciary Acts were repealed by the Act of 1888.

We realize full well, with the utmost deference to this Court, the difficulty which it will have in attempting to view the amendment of 1888 in any light other than in the light in which it has been viewed for the past twenty-four years, i. e. that its sole purpose was to restrict rather than to enlarge the jurisdiction of the Federal Courts. This is unquestionably true as to the ordinary actions which result in judgments **in personam.**

But we do feel that the Act must be presumed to have been passed by Congress with knowledge of the existence of the broad provision contained in the Act of 1872 relating to attachments, and that when the two are read as one enactment, there is abundant room for our contention that under the literal terms of the two statutes, a non-resident attachment may properly issue out of the Circuit Courts.

Act of 1888.

And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Act of 1872.

"In common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant which are now provided by the laws of the State, in which such Court is held, for the Courts thereof."

This Court has never interpreted the first portion of the Act of 1888 literally in cases of diverse citizenship. To do so would render the latter portion meaningless. It's uniform interpretation from the first has been that where diversity of citizenship has been the ground of jurisdiction the latter portion stands and the former portion falls, and that in such cases the defendant may be sued out of the district of which he is an inhabitant.

McCormick Harvesting Machine Co. vs. Walthers, 134 U. S. 41 (1890).

> "The object of an attachment is to compel the appearance of the defendant" who cannot be reached by personal service.
>
> Campbell vs. Norris, 3 H. & McH. (Md.) 535.

> "The proceeding by attachment is only process to compel the appearance of a party whose person cannot be reached by process of the Court, and is not a proceeding in derogation of the common law, but rather in mitigation of the severity of the common law in favor of the defendant."
>
> Barney vs. Patterson, 6 H. & J., (Md.) 182.

Hence, if a debtor can be sued, with personal service or voluntary appearance, in the Federal Courts out of the district of his residence under the Judiciary Act of 1888; if the creditor shall be entitled in the Federal Courts to similar remedies by attachment as provided by the laws governing the State Courts; and if the laws relating to attachments in the State Courts provide such as a substitute for personal service or voluntary appearance of a non-resident in order to compel his appearance, why can not the Federal Courts compel the defendant's appearance by attachment in the same way as is done in the State Courts?

Prior to the Act of 1888 the answer was clear—the Judiciary Acts expressly prohibited even the **bringing of a suit** against a non-resident.

But the Act of 1888 provides in terms that a non-resident may be sued where the plaintiff resides.

In the ordinary action requiring personal service he must,

of course, be served with process in the district in which the suit is brought.

In this respect the Federal law is no different from the State law. In the ordinary action requiring personal service, the defendant must be served with process in the State where sued.

But the State laws provide that where the defendant resides out of the State, **but has property within the State,** an attachment, which in the State Courts is only an incident of the suit, may take the place of personal service.

Section 915 of the Revised Statutes, the Act of 1872, tries to say the same thing.

And we respectfully submit that there is nothing in the Judiciary Act of 1888 to keep it from saying it.

The attachment in the case at bar was a valid attachment under the laws of West Virginia, as will appear by reference to the sections from the Statutes of that State set out in the brief of the Defendant in Error at pages 26 and 27. It was so treated by the learned Judge below in his opinion, page 13, where he says:

> "This order was served upon the Receivers as such and upon Benjamin H. Read, individually, and so far as practical effects are concerned, operates as an attachment in the hands of the co-receivers."

The effect of the service upon the garnishees out of the district will be considered later. At this point, suffice it to say that the fund was in the hands of receivers of the West Virginia Court who happened to reside in Maryland, but were constructively within the district of their appointment.

It is contended by learned counsel for the defendant in error that this Court in its opinion in the case of Laborde vs. Ubarri, 214 U. S. 173, re-iterated the principle laid down in Ex Parte Railway Co. supra, and cited that case with entire approval, a portion of the opinion being quoted on page 16 of their brief.

We do not understand the opinion in that case delivered by Mr. Justice Holmes to affirm the proposition that a non-

resident attachment can not properly issue out of a District Court in a State where the laws permit such form of attachment. To the contrary it would seem that the opinion of this Court was based wholly upon the propositions that private property of the heirs could not be held to answer a judgment in a suit against the succession, and that if the suit was to be regarded as a suit to enforce personal liability of "such heirs as could be caught" it would fail for the reason that there was no such liability.

Reliance is also placed upon the decision of this Court in the case of Clark vs. Wells, 203 U. S. 164, 51 L. ed. 138. The whole point in this case was whether or not a non-resident attachment should be dissolved after it had been laid on property of the defendant within the jurisdiction of the State Court, and the case had been removed into a Federal Court. This Court re-iterated the well-recognized proposition, which we are not for a moment disputing, that a judgment in personam can not be rendered against a defendant in a Federal Court without personal service or his voluntary appearance, but held that the Federal Court having acquired jurisdiction of the defendant's property through its attachment in the State Court, the Federal Court could subject such property to the payment of the defendant's debts.

In conclusion, we can see no reason in any of the decisions of this Court why an attachment should not be permitted to issue out of the Federal Courts against the property of a non-resident debtor.

The only reason urged is because inasmuch as a judgment in personam cannot be had against a defendant without personal service or his voluntary appearance, therefore the main suit cannot be maintained, and the attachment being but an incident of the main suit, must fail.

But this argument ignores entirely the purpose and effect of an attachment proceeding as known in the State Courts.

The West Virginia Statutes relating to attachments do not contemplate a judgment in personam against the debtor

without personal or voluntary appearance, and the State Courts of West Virginia would have no more power to enter up such a personal judgment than would the Federal Courts.

The State laws only say that the property of the non-resident defendant can be subjected to his just debts, and by their provisions for the attachment of such property, publication and personal notice outside the State, give him a fair opportunity to come voluntarily into Court and say that the claim of the plaintiff is not a just one. If he fails to avail himself of this privilege so afforded him, such failure is regarded as tantamount to an admission of the justice of the claim, and his property is applied accordingly. If he comes in and successfully disputes the justice of the claim, then his property is discharged from the attachment.

And Section 915 of the Revised Statutes clearly gives the same right of attachment in the Federal Courts as obtain in the State Courts. The only effect of the decisions is that no judgment in personam can be rendered in such a proceeding against the defendant without personal service or voluntary appearance, and such is also the rule of the State Courts.

One purpose of the attachment in the State Courts is to **compel such voluntary appearance,** and such would be the effect of an attachment in the Federal Courts.

II.

That the motion filed in this cause on behalf of the defendant to dismiss the action and quash the attachment constituted such a voluntary appearance in this cause on the part of the defendant as to give the Circuit Court for the Northern District of West Virginia jurisdiction to grant the plaintiff in error a personal judgment against the defendant, and to pass a final judgment or order subjecting to the claim of the plaintiff the funds, assets and credits of the defendant in this cause sought to be attached.

This proposition is embraced in the second and third assignments of error.

The Fifth ground set forth in the motion to quash, (Record, p. 10,) is as follows:

> "Fifth, The fund or compensation ordered by this Honorable Court to be paid to the defendant **for services as Receiver** was not, at the time of the issuance of said writs or at any time since, liable to be attached upon the alleged indebtedness of the plaintiff or for the payment thereof in this Honorable Court."

We readily acquiesce in the proposition laid down in the case of Davis vs. C. C. C. & St. L. Ry. 217 U. S. 157, referred to in the brief of the defendant in error, to the effect that a defendant in an attachment case may appear specially and question the jurisdiction of the Court both as to his person and as to the property attached, and that in such class of cases his attack upon the jurisdiction of the Court to maintain the attachment of his property will not be considered in the light of a plea to the merits of the case on the facts. Were the rule otherwise, he would have to stand outside the borders of the district, see his property sold under attachment proceedings which were void for want of jurisdiction, and be powerless ever to raise that question.

But the rule allowing him safely to intervene in such cases goes no further than the reason for the rule.

If a party wishes to raise a question of jurisdiction, he must confine himself to such points as can properly be decided only on the ground that the Court has or has not jurisdiction.

If the Court decides that question in his favor, that is an end of the case, and he need not go into the merits. If the Court decides that question against him, then it is optional with him whether he shall appear generally and defend the case upon its merits or not. His special appearance for the sole purpose of raising the question of jurisdiction will not, under such circumstances, be regarded as a general appearance or as a waiver of his objections to the jurisdiction.

But in filing a plea or motion to raise the question of jurisdiction, the defendant must not go further and raise a question which can be decided upon any ground independent of that of the Court's jurisdiction. If he does so, he will be deemed to have waived his right to insist upon the Court's lack of jurisdiction and to have elected to defend the case upon its merits.

By submitting that clear question to the Court, he tacitly admits that the Court has jurisdiction to determine it, and consents to it being determined by such Court.

And that is exactly what the defendant in error has done in this case by the Fifth ground of his motion.

He has departed wholly from all questions of jurisdiction, and has clearly raised the concrete and independent question whether or not the commissions of a receiver are liable to attachment. That was the plain purpose of that ground in his motion. And the answer to this question did not in any sense depend upon the jurisdiction of the Court as a Federal Court.

Had the Court been of the opinion that it had jurisdiction to issue an attachment and maintain the same notwithstanding the lack of personal service upon the defendant, and that the property was within its jurisdiction, it could still have quashed the attachment under this motion solely upon the ground that the commisisons of a receiver were not liable to attachment.

And the effect of all the decisions is that where a defendant does elect to have the Court pass upon the merits of his case, such election constitutes a waiver of his objections to the Court's jurisdiction upon other points.

The only exception to this rule is where the Court has no jurisdiction over the subject-matter. In such cases, no consent of the parties can confer jurisdiction. But in the case at bar, the subject matter of the suit was the claim of the plaintiff against the defendant for $2,065.00. The plaintiff being a corporation of West Virginia and the defendant being a resident of Maryland, the Circuit Court of the Northern District of West Virginia under the Judiciary Act of 1888, had jurisdiction of the subject matter, provided only that no personal judgment could be rendered against the defendant without personal summons within the State or his voluntary appearance.

The non-resident attachment was an incident to this suit. Whether the attachment itself would lie without personal service or not is the question which we have previously discussed. But there can be no question under the authorities that such an attachment would lie if the defendant voluntarily came in the district and filed a plea or motion attacking the attachment upon its merits.

And that is what the defendant did. What he did was to say in effect to the Circuit Court, "You have no jurisdiction to render a personal judgment against me, or to maintain this attachment upon my property, but whether you have such jurisdiction or not, you can not maintain this attachment, because the fund attached is made up of commissions of a receiver which are not attachable aside from any question of jurisdiction."

While we might cite dozens of authorities upon the above propositions, we feel that they are so elementary and self-supporting, and that the general principles enunciated by us have so frequently been recognized by this Court in the decisions hereinbefore quoted, and also in the case of Fitzgerald vs. Fitzgerald, 137 U. S. 98-106, 34 L. ed. 608, that we will refrain from burdening the Court with such authorities.

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It seems to us that the only question upon this phase of the case is one as to the real meaning and purpose of the Fifth ground of the defendant's motion, (Record page, 10.)

If it was designed and intended to raise the question whether or not a receiver's commissions as such were attachable, independently of any question as to the Court's jurisdiction to issue a non-resident attachment, then our point is good.

If, on the other hand, it was designed and intended to raise only the question whether or not a non-resident attachment could issue out of a United States Circuit Court at all then our point is bad.

Certainly it was designed and intended to mean something. The defendant had already said that the Court had no jurisdiction to maintain the action, which included the attachment, and that the Court had no jurisdiction in rem. The Fifth clause was certainly not intended as a mere repetition of those contentions. But it was clearly designed and intended as a contention that receiver's commissions as such were not subject to attachment, a question which has been threshed over and over in the Courts of this country for the past fifty years at least, and as to which there is much apparent conflict of authority and room for the finest distinctions in the application of decisions.

Under such motion the Court, had it wished to do so, and if it had been of such opinion, could have granted the motion to quash without ever touching upon the question of its jurisdiction to maintain a non-resident attachment.

It was simply one of those anchors to the leeward which skilful attorneys frequently throw out to fall back upon in case they are overruled upon their main contention, and the Court below could not have decided such motion against the defendant in its entirety until it had first determined that it had jurisdiction to issue and maintain a non-resident attachment, and had then gone on and decided that the commissions of a receiver were subject to attachment.

And if such be the proper construction of the Fifth clause of the motion, then the same clearly submitted the question to the Court upon its merits, and was an admission of the Court's jurisdiction to determine that question.

NTER

III.

That the property attached, consisting of an allowance of commisisons to a receiver not finally awarded by the Circuit Court of the United States for the Northern District of West Virginia, and being in the hands of receivers appointed by that Court and acting under its jurisdiction, was within the Northern District of West Virginia for purposes of attachment notwithstanding the fact that the receivers themselves resided in the State of Maryland; and that the service of the Court's order attaching said fund, was a valid and effective attachment thereof, notwithstanding the fact that such order was actually served upon said receivers outside the Northern District of West Virginia.

These questions were raised and argued below by counsel for the defendant in error, but the learned Judge below in his opinion, (Record, page 13) treated the order of June 26, 1911 as an attachment in its practical effects, and there would seem to be no reason under the West Virginia Statute and the peculiar circumstances of this case why it should not so be treated.

It is to be borne in mind that the garnishees in this case were not strangers to the Court, but were the Court's own officers, and that the fund in their hands was held by them subject to the jurisdiction of the Court. It is true that the fund was under the jurisdiction of the Circuit Court on its equity side, and that the attachment issued out of the law side of the Court. But that fact did not affect the actual or constructive situs of the fund itself. That fund, regarded merely as a credit, was actually within the Northern District of West Virginia, just as much as though the Court had held in its own hands a certificate of deposit covering the amount. The mere fact that the certificate of deposit happened to be the possession of one or both of the receivers and that they were in Maryland, could make no difference.

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The receivers were the hands of the Court. It would be idle to contend that the Court was in the Northern District of West Virginia, but that its hands were in Maryland, and hence beyond its jurisdiction.

The situation is covered in principle, if not literally, by Section 3 of the Act of August 13th, 1888, Ch. 866, 25 Stat. L. 433, providing:

> "Section 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed.
>
> "But such suit shall be subject to the general equity jurisdiction of the Court in which such receiver or manager was appointed, so far as the same shall be necessary to the needs of justice.

This section was construed by this Court in the case of Gableman vs. Peoria, etc. R. Co., 179 U. S. 335, 45 L ed. 220, Mr. Chief Justice Fuller delivering the opinion, in the course of which he said:

> "It should be added that while these actions against receivers may be brought in other courts, they may, nevertheless, also be brought in the Court in which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration."

In the case at bar the Court could have ordered the receivers to come to West Virginia and bring the fund with them in order to enable the Marshal to lay the writ of attachment in their hands. They would have had to come. To save them that unnecessary annoyance the Court passed the order of June 26th, 1910, (Record, page 7.)

> "It is further ordered that a copy of this order also be served upon Jesse L. Slingluff and Benjamin H.

Read, special receivers in the chancery cause of The Baltimore Trust & Guarantee Company vs The Oakland Coal and Coke Company, which shall be notice to them of this proceeding, and that said claim of the said defendant is sought to be attached in this proceeding."

This order was duly served upon the Receivers in Baltimore by a United States Marshal, (Record, page 9).

Certainly under such circumstances it can not fairly be contended that the attachment was invalid for the reason that it was not served upon the garnishees within the Northern District of West Virginia.

Respectfully submitted,

OSBORNE I. YELLOTT,

Attorney for Plaintiff in Error.

BIG VEIN COAL COMPANY OF WEST VIRGINIA *v.* READ.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

No. 501. Argued April 11, 1913.—Decided May 26, 1913.

A Circuit Court of the United States has no jurisdiction to issue an order of attachment in a case where no personal service can be had upon the defendant and where there has been no personal appearance in the action.

Neither under § 915, Rev. Stat., nor under any provision of the act of March 3, 1887, as amended August 13, 1888, can the auxiliary remedy by attachment be had in a Circuit Court of the United States where that court cannot obtain jurisdiction over the defendant personally.

An attachment is still but an incident to a suit and unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court.

This court will not construe an amendment to the judiciary statute as making such a radical change as granting a new remedy unless provision is clearly made for making the remedy effective; and so *held*, that as Congress did not in the act of March 3, 1887, as amended August 13, 1888, make any provision for service by publication, the act will not be construed as giving jurisdiction to Federal courts to grant attachments in cases where the defendant cannot be served.

In the Federal courts an appearance may be made for the sole purpose of raising jurisdictional questions without thereby submitting to the jurisdiction of the court over the action; and where, as in this case, no issue involving the merits was made, a special appearance to object to the jurisdiction does not give the court jurisdiction to issue an attachment.

THE facts, which involve the jurisdiction of a Circuit Court of the United States to issue an order of attachment in a case where no personal service could be had upon the defendant and wherein there was no personal appearance to the action, are stated in the opinion.

Mr. Frank Gosnell and *Mr. Wm. L. Rawls*, with whom *Mr. Geo. Weems Williams* was on the brief, for defendant in error, in support of motion to dismiss.

Mr. Osborne I. Yellott for plaintiff in error in opposition thereto.

MR. JUSTICE DAY delivered the opinion of the court.

This case involves the jurisdiction of a Circuit Court of the United States to issue an order of attachment in a case where no personal service could be had upon the defendant and wherein there was no personal appearance to the action.

The case was begun in the Circuit Court of the United

States for the Northern District of West Virginia to recover in debt upon certain promissory notes. A summons was issued against the defendant, Benjamin H. Read, trading as Lynah & Read, and return was made by the marshal that the writ had not been served, as defendant was not found in his district. Thereafter an affidavit was filed for an attachment, setting forth that the defendant was one of the receivers of the Circuit Court of the United States for the Northern District of West Virginia of the property of The Oakland Coal & Coke Company and that there had been allowed to him for his services as such receiver the sum of two thousand dollars. An order of attachment was issued, and the return of the marshal stated that he had been unable to locate any property in his district upon which to serve the attachment and accordingly returned the writ, "no property found." Afterwards an order was made which, after reciting the beginning of the suit and that the defendant was a nonresident of West Virginia; that the special master had found the sum of two thousand dollars due him as such receiver, and that an order of attachment had been issued and placed in the hands of the marshal for the purpose of attaching the estate of the defendant, provided that a copy of the order be served upon the defendant, that he appear before the court and that a copy of the order served upon the defendant and one Slingluff, special receivers in a suit entitled *The Baltimore Trust & Guaranty Company* v. *The Oakland Coal & Coke Company*, should be notice to them of the proceedings and that the claim of the defendant was sought to be attached therein.

A copy of the order was served upon the defendant in Baltimore, Maryland, who thereafter appeared by his counsel for the purpose only of objecting to the jurisdiction of the court and moved the court to dismiss the suit and quash the attachment upon the following grounds:

"First. The record shows that this defendant is not a

citizen of or resident in, nor found within the Northern District of West Virginia.

"Second. The record shows that the defendant has no property whatever within the said State or District.

"Third. That this court has no jurisdiction *in rem* or *in personam* in said action.

"Fourth. That at the time of the suing out of the writs of summons and of attachment herein on the 26th day of June, 1911, this defendant was not a citizen or resident or found within West Virginia, and he had no property in said State or District, and at no time since has this defendant been such citizen or resident, or had any property within the said District, although the return day of the said writs has long since passed and the defendant makes the said writs and the returns thereon by the Marshal for the Northern District of West Virginia a part of this motion.

"Fifth. The fund or compensation ordered by this Honorable Court to be paid to the defendant for services as Receiver was not, at the time of the issuance of said writs or at any time since then, liable to be attached upon the alleged indebtedness of the plaintiff or for the payment thereof, in this Honorable Court.

"Sixth. This Honorable Court has no jurisdiction either of property or person giving jurisdiction for the maintenance of the said action."

Thereafter the case coming on to be heard, counsel appearing for the defendant for the purpose of objecting to the jurisdiction and for the purpose of the motions filed only and further moving the court to vacate and set aside the orders issued and to quash the service of summons in the action and to dismiss the case, certain facts were found, without prejudice to any motion of the defendant and without enlarging the appearance of the defendant, as follows:

"Messrs. Read and Slingluff were appointed Receivers in the cause of the *Baltimore Trust & Guarantee Company*

v. *The Oakland Coal & Coke Company of West Virginia*, a cause pending in the United States Circuit Court for the Northern District of West Virginia, by an order in said cause passed on the twelfth day of June, 1907, and the receivership estate being ready for distribution on June 20, 1910, this Court passed a decree referring the cause to Special Master C. D. Merrick, with directions among other things to make a report 'including costs and allowances and fees to the end that a full and complete decree might be made for the distribution and settlement of the estate.'

"On May 15th, 1911, the Special Master filed such report. Among other allowances were the following:

"'That Benjamin H. Read, for his services as Receiver, is entitled to and should be allowed the sum of Two Thousand Dollars.'

"That no objection had been taken or exceptions made to the above allowance at the time the attachment was laid in this cause.

"That in July, 1911, this court passed an order ratifying the report of the Master as to the above and similar allowances, but directed that the allowance of $2,000 commissions to B. H. Read be retained by the Receivers pending the determination of the questions arising out of such attachment."

Afterwards the court delivered an opinion in which the judge directed that the former order, amounting to an attachment, should be set aside and held that, inasmuch as personal service upon the defendant in the action might yet be obtained by alias summons, he would not then dismiss the action. Later the plaintiff refused to direct the issuance of alias summons, and upon motion judgment was entered dismissing the action, and a certificate was made by the court.

The certificate states that the judgment complained of in plaintiff's writ of error, which was set out, is based solely upon the ground that the court had no jurisdiction as a

Federal court to grant relief to the plaintiff by subjecting to the claim of the plaintiff the assets and credits of the defendant, to be attached in the case, without personal service of summons upon him or his voluntary appearance in the cause, and that the motion filed in the case did not constitute a voluntary appearance, and that the court, as a Federal court, had no jurisdiction to grant a personal judgment against the defendant or to make a final judgment or order subjecting to the claim of the plaintiff the assets and credits of the defendant so sought to be attached.

The attachment was sought to be levied and was claimed to be authorized under the act of June 1, 1872, 17 Stat. 196, c. 255, now § 915 of the Revised Statutes. It is as follows:

"In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Assuming that the attachment could be issued under the laws of West Virginia, under this statute was there authority in the courts of the United States to issue the attachment, it appearing that no service had been or could be made upon the defendant and that he had not appeared in the action?

Section 915 was before this court in *Ex parte Railway Company*, 103 U. S. 794, and it was held that as, under § 739 of the Revised Statutes, Act of March 3, 1875, 18

Stat. 470, c. 137, then in force, no civil action, not local in its nature, could be brought against any one by original process in any United States Circuit Court other than that for the State of which he was an inhabitant or in which he was found at the time of serving the writ, an attachment could not be issued, the defendant being a nonresident and not having been served with process. It was further held that an attachment was but an incident to a suit and unless the suit could be maintained the attachment must fall. In other words, in cases where the defendant could not be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment could not be had, as attachment was not a means of acquiring jurisdiction. The same view was taken in *Nazro* v. *Cragin*, 3 Dillon, 474, by Mr. Justice Miller, on the circuit. *Ex parte Railway Company, supra*, was but an affirmance, as to the right of attachment where no personal service could be had, of the former case of *Toland* v. *Sprague*, 12 Peters, 300, wherein it was held that a person was not amenable to attachment against his property except where process could be served upon his person.

It is contended, however, that since the act of March 3, 1887, 24 Stat. 552, c. 373, as amended August 13, 1888, 25 Stat. 433, c. 866, the right of attachment should be held to exist in cases like the present. The statute of 1888 provides:

"And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plantiff or the defendant."

The argument is that the right to issue an attachment under the act of 1872 should obtain, since the law now permits suit in the district of the residence either of the

plaintiff or defendant, omitting the provision of the act of 1875 that the defendant could be sued only in the district in which he was an inhabitant or could be found at the time of commencing the proceeding. But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court. See *Laborde* v. *Ubarri*, 214 U. S. 173; *United States* v. *Brooke*, 184 Fed. Rep. 341.

Another contention is that the defendant in appearing for the purpose of the motion submitting to the court the question of the right to attach his compensation as receiver in the court, had voluntarily submitted to the jurisdiction of the court, but we are of the opinion that this contention is untenable. It is the settled practice in the Federal courts that an appearance may be made for the sole purpose of raising jurisdictional questions, without thereby submitting to the jurisdiction of the court over the action. *Goldey* v. *Morning News*, 156 U. S. 518; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453.

It is true that where the defendant appears by motion and objects to the jurisdiction and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, where a demurrer was interposed raising two grounds of jurisdiction and the third going to the merits of the cause of action, and it was held

that there had been a submission to the jurisdiction of the court. See also *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368.

In this case, however, the submission was not of any question involving the merits of the suit, but of one with reference to the jurisdiction of the court to issue the attachment, adding the further ground that the property in question was not subject to attachment or garnishment. No issue was made involving the merits of the action. This special appearance was sufficient to raise the question of jurisdiction only. *Davis* v. *C., C., C. & St. L. Ry.*, 217 U. S. 157.

In our opinion the Circuit Court did not err in holding that it had no jurisdiction to issue the attachment in this case.

Judgment affirmed.